TOWARD *our Reformation* • FROM LEGALISM *to* VALUE-ORIENTED ISLAMIC LAW *and* JURISPRUDENCE

Mohammad Omar Farooq

TOWARD OUR REFORMATION:

FROM LEGALISM TO VALUE-ORIENTED ISLAMIC LAW AND JURISPRUDENCE

This humble work is dedicated to my loving late mother Momtaz Begum
and my living father Lt. Col. (Rtd.) M. Shamsuzzoha, whose
affection as well as sacrifice and support for my
life's pursuits have been most precious.

"My Lord, have mercy on both of them (my parents),
as they did care for me when I was little!"

(QUR'AN: AL-ISRA: 17:24)

TOWARD OUR REFORMATION

From Legalism to Value-Oriented Islamic Law and Jurisprudence

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Mohammad Omar Farooq

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P.O. BOX 669, HERNDON, VA 20172, USA
www.iiit.org

LONDON OFFICE
P.O. BOX 126, RICHMOND, SURREY TW9 2UD, UK
www.iiituk.com

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ACKNOWLEDGEMENTS

INITIALLY I PREPARED five independent essays covering Shari'ah, Hadith, Ijma', *Qiyas* and the empirical foundation, and shared these with some people close to me. The earlier versions were made available on the internet to which I started receiving unsolicited feedback, mostly positive to highly positive, from both fellow Muslims and non-Muslims. Several friends acted as the catalyst to encourage me to compile the essays into a coherent book, which became a lengthy project in itself. Among those friends are M. Saiful Islam whom I have known for more than 20 years, Dr. Steve Connolly, a Muslim revert and Dr. M. Kabir Hassan. Dr. Hassan has gone out of his way to facilitate publication of this book.

Dr. Connolly enthusiastically volunteered editing assistance, and his tremendous efforts in transforming this work in terms of its correct presentation and formulation of an attractive fluent version, has been most invaluable. For certain chapters, he also provided meaningful critique and enriched this work substantively. I must also acknowledge the valuable editorial assistance rendered by Syed M. Islam who should have been a professional editor, but settled for greater success in other fields. Syeda Ahmad has provided capable help with copyediting.

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May God shower abounding mercy and blessings upon all those whose encouragement, support, input and guidance have made this possible. Of course, sole responsibility for the content rests with me. I seek forgiveness from God for any error in this work and His blessings for anything relevant and worthwhile.

MOHAMMAD OMAR FAROOQ
August 25, 2009

A WORD FROM THE AUTHOR

THIS BOOK GREW out of my life-long effort as a student of Islam. As a Muslim my interest in Islam and my concern for the Muslim world, as well as humanity in general, is only natural. The condition of the Muslim community, of which I am part, greatly agonizes me. With unshakeable faith in Islam and its capacity to guide us in our pursuit of a balanced, wholesome and dynamic life in this world, I have confidence that the Islamic message can help to improve us, place mankind on the path to salvation and serve humanity through its good example.

Such a vision calls for understanding our past, to help us chart a better future. As an independent-minded Muslim with an Abrahamic perspective I have never felt comfortable unquestioningly accepting "laws and codes" in the name of Allah (SWT),* the bulk of which at the level of detail, excluding a few explicit injunctions and prohibitions, consist in reality of interpretive constructs emanating from fallible humans.

A Muslim believes in the Qur'an as the final Divine guidance and in the Prophetic legacy by way of a comprehensive and dynamic example. Muslims also deeply value the past contributions of their scholars and pious ancestors, a valuation that must be tempered according to a dispassionate critical appraisal informed by the Qur'an, the Prophetic legacy and real-life experience.

Muslims are primarily bound to the Qur'an and the Prophetic legacy; all else should be non-binding. However, our understanding of and connection to the Qur'an, together with the Prophetic legacy, is now completely clouded with the intermediation of the accumulated corpus of knowledge and discourse built up through the ages. The reality of our situation is much worse because the prevalence of legalism rooted in that intermediation has overtaken the Muslim mind and culture.

To reconnect with the Qur'an and the teachings of the Prophet (SAAS)** more directly common Muslims need empowerment to better understand the foundations of Islamic law and jurisprudence. As the Qur'an opened my mind and the Prophetic legacy served as the normative model (*uswatun hasanah*), I could not but re-examine dispassionately the "laws and codes" that are presented to us as "Islamic" or "*sharʿi*." This book is the outcome of my ongoing study.

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*(SWT) – *Subhanahu wa Taʿala*: May He be praised and may His transcendence be affirmed. Said when referring to God.

**(SAAS) – *Salla Allahu ʿalayhi wa sallam*. May the peace and blessings of God be upon him. Said whenever the name of Prophet Muhammad is mentioned.

PUBLISHER'S FOREWORD

Toward Our Reformation: From Legalism to Value-Oriented Islamic Law and Jurisprudence by Dr. Mohammad Omar Farooq is a delicate and challenging work which engages the reader to think and become familiar with many of the subjects traditionally left to the purview of specialist Muslim scholars, particularly the Shariᶜah, Hadith, Ijmaᶜ and *Qiyas*, with a view to discussing the ways in which they are understood and implemented today.

No doubt readers will agree with the author's strong critique of the misapplication and abuse of *hudud* law and Shariᶜah rulings in today's society. But where the work may prove difficult reading is his dissection of hadith and in certain cases the flawed use of certain juristic tools in the arsenal of *usul al-fiqh*. Before discussing the content of the work and wherein lies its value, we would like to point out that not all the opinions expressed in this book are those of the publisher.

It is the position of the IIIT that essentially the Shariᶜah is the divine law, as stated in the Qur'an and the Sunnah (see verses: 42:13; 45:18; and 59:7), while fiqh is the law derived by *fuqaha'* (jurists) from the Qur'an and the Sunnah using tools of deductive reasoning under the umbrella of the science of *usul al-fiqh*, tools such as ijmaᶜ, *qiyas*, etc. In terms of being divine we have to distinguish that which is divine from that which has been unwarrantably enlarged by scholars over the centuries. By enlarged is meant substantial expansion by way of copious scholastic views and opinions. Those elements of the Shariᶜah comprising *qudsi*, *mutawatir* and truly authentic *ahadith*, can be considered divine. By truly authentic is meant those *ahadith* which do not contradict the Qur'an, do not betray the Prophet's character or message, and of course whose chain of transmission is indisputable and strong. Those comprising (the greater part in fact) of *fiqhi* rulings arrived at via deductive reasoning cannot be considered divine. In point of fact, the great

fuqaha' were careful to note their fallibility and to stress that their rulings were not intended for all time. However, with the passing of centuries, and continued application of dated juristic rulings, the latter became ultimately, and inevitably, entrenched, with both ijtihad and the science of *Maqasid al-Shariᶜah* ever marginalized as valid tools in the juristic process. So much so that later generations of Muslims came to regard the rulings, albeit of the great *fuqaha'*, as sacred, inviolable, and a divine part of the Shariᶜah, giving them a status the *fuqaha'* had never intended.

Furthermore, *we need to be extremely careful using terminology such as divine* and be crystal clear as to what this means in practice and what this refers to. And the author is right to point this out. Traditions of the Prophet cannot be given the undisputed authenticity of the Qur'an. The Qur'an stands unique and alone and not on a par with anything else. The problem occurs with ideas of equivalence, the Shariᶜah is divine in the sense we have mentioned, but not divine in the sense of being equivalent to the Qur'an.

We may wonder at the *qudsi*, *mutawatir* as well as truly authentic *ahadith* of the Prophet not being huge in number. This is precisely the great scope and strength of the Shariᶜah, for this conciseness protects against legal and social stultification – in other words the chaining of the present to the past – allowing room for jurists to take account of changing human conditions, categorically the changes of time or circumstance. Of course not all the ills of the Muslim world can be laid at the door of *fiqhi* rulings, or weak inauthentic *ahadith*; the malaise of the Muslim world is far too complex. This would be an oversimplification and is not our contention. Nevertheless, we are confident that most would agree that following in the footsteps of Islam's best intellectual tradition, some housekeeping is in order. Herein lies the value of this work.

According to the author, at the heart of the Muslim predicament lies ignorance and/or lack of commitment to core Islamic values that once profoundly defined Islam and Muslim practice. Hence, what he advocates throughout this work is a return to what is termed a "value-oriented" approach. The author contends that once this is acknowledged and implemented, with blind and petrified imitation of the past

stopped, the doors to understanding and revival will begin to open, restoring to the Muslim world its dignity, vigor and integrity, as well as allowing Muslims to overcome many of the social and other problems they face today.

It is with this in mind that the author calls for the implementation of the value-oriented approach (taken from the Qur'an and the life of the Prophet Muhammad) in determining Muslim understanding of the Shari^{c}ah and daily life. The Qur'an is the supreme source and the final arbiter. As Prophet Muhammad was the Last Prophet sent by God to all mankind, the author contends that interpretations of both the Qur'an and Hadith are not to be fixated in time and place. Rather, they are to be carefully examined and reinterpreted to give practical guidance to meet the requirements and challenges of a new age, thus taking into account the time-space factor. It is here that the science of *Maqasid al-Shari^{c}ah*, or the higher intents and purposes of Islamic law, comes into its own as the heart and philosophy of Islamic law. At what possibly forms the core of the argument is the belief that with the passage of time what we today consider the Shari^{c}ah is in effect an original, some would say "true," nucleus hidden in a labyrinthine shroud of scholastic views and deductions hindering Muslim development, and that to rely on fraudulent hadith and fallacious implementation of *hudud* law is not only to betray the spirit of the Qur'an and the Prophet's message, but a dangerous exercise. One of the disastrous consequences being blatant abuse of the Muslim populace under cover of implementing a bogus Shari^{c}ah. The author explores many aspects of this abuse and misapplication throughout the work.

This study is being published to widen discourse, invite scholars to respond, and hopefully pave the way for further research. Since it deals with some critical and difficult issues, doubtless readers may agree with some of the issues raised, and disagree with others, but it is hoped that for the most part both general and specialized readers will benefit from the perspective offered and the overall issues examined in the book.

Where dates are cited according to the Islamic calendar (hijrah) they are labelled AH. Otherwise they follow the Gregorian calendar and labelled CE where necessary. Arabic words are italicized except for those which have entered common usage. Diacritical marks have been

added only to those Arabic names not considered modern. All emphases (rendered in bold, italics or both) have been added by the author, unless noted otherwise.

The IIIT, established in 1981, has served as a major center to facilitate serious scholarly efforts based on Islamic vision, values and principles. The Institute's programs of research, seminars and conferences during the last thirty years have resulted in the publication of more than four hundred titles in English and Arabic, many of which have been translated into several other languages.

We express our thanks and gratitude to the author for his cooperation throughout the various stages of production. The editorial process has been a long and involved one with the author requested to make changes, clarify information, and review suggestions on a number of issues. Not all editorial proposals were taken on board but the editor-author consultative process proved to be an intellectually stimulating one and we hope has benefited the work.

IIIT London Office, *August 2011*

FOREWORD

*Mohammad Nejatullah Siddiqi**

IT IS REPORTED THAT ABU SAIED stated that the Prophet, peace be upon him, said: "No one amongst you should belittle himself." The people said "O Prophet of Allah, why would anyone belittle himself?" He said, "One finds oneself in a situation relating to (the cause of) Allah that demands that he speak out but he does not speak out. Allah the Exalted shall ask him on the Day of Judgment: 'What prevented you from speaking out in such and such matter?' He would reply: 'Fear of people.' Allah shall say: 'You were expected to fear no one except Me!'"[1]

Dr. Mohammad Omar Farooq has spoken out. The result, the book before you, may not please some. But if dispassionately read, especially in the perspective of the above hadith, can be quite rewarding. The author is no scholar of Islamic jurisprudence, the subject of this book. He does not pretend to be one. But his concern about many rulings currently pronounced in the name of Islamic law running counter to the objectives of that law, the *Maqasid al-Shari*ᶜ*ah*, is genuine and widely shared.

Things must change. Pointing out the anomalous rulings and inviting their reconsideration is one step towards that change. Their discussions need not remain confined to experts in traditional fiqh. Many of the issues involved call for expertise outside the domain of the *madrasah*-educated scholars, especially from social scientists like our author. Wider participation should not be frowned upon. In fact, it should be welcomed. There is a tendency, in certain circles, to disqualify all non-Arabic speaking and non-specialist people from such discourse. This is not acceptable. It is quite contrary to our lofty traditions of the past. According to al-Shatibi (d. 1388 CE):

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* *Dr. Mohammad Nejatullah Siddiqi is a pioneering Islamic economist and one of the most prolific and important contributors to the field of Islamic economics and finance today.*

> When ijtihad relates to inferring from Text, a knowledge of Arabic would be essential. But if the focus is not the purport of the text but a conceptualization of the *masalih* and *mafasid* involved, a knowledge of Arabic may not be essential. Same applies to cases in which the *masalih* and *mafasid* involved are fully recognized by one competent to make ijtihad on the basis of text. An understanding of the objectives of Shariah from (study of) the Shariᶜah, in summary as well as in detail, will be sufficient in such cases…
>
> Whosoever has come to understand what are the purposes of giving rulings in Shariᶜah and is so advanced in this understanding that he could be regarded as knowing what the objectives of Shariᶜah are, (for him) it makes no difference at all if he acquired that knowledge through translations in some of the non-Arab tongues. He and the one who acquired the understanding from Arabic readings are at par.[2]

I quote this eminent authority not as an apology for the author, who does not need one, but to encourage readers actively to participate in the discourse the author seeks to initiate by publishing this book. To me the initiative is what matters, though not to underestimate the substance of his work. You do not have to agree with many of the author's opinions. Nor do I. The message of the book is: think, study the current situation in the light of the objectives of Shariᶜah, and speak out.

Some of the chapters make very painful reading indeed. But that is what is out there in reality. The author is only holding a mirror to our face. That is what comes out of a methodology that neglects the *Maqasid al-Shariᶜah*, relying exclusively on fiqh rulings given hundreds of years ago in a different social milieu. Some stocktaking is seriously overdue.

Aligarh, *27 June 2007*
mnsiddiqi@hotmail.com

PREFACE

The Prophetic Sunnah: A Methodological Vision

TAHA JABIR ALALWANI*

WHEN GOD REVEALED THE QUR'AN to Prophet Muhammad over a period of twenty-three years as a Guide and a straight path, he was commanded to recite the Revelation to people and to teach them to derive wisdom and purification from it. Throughout his life, Prophet Muhammad never once informed people that he had brought them anything other than the knowledge and wisdom contained in the Qur'an. Hence, when ʿAli ibn Abi Talib was once asked concerning the claim of certain people that the Prophet had bestowed on his family knowledge and wisdom beyond that contained in the Qur'an, he responded: "By the One who causes the grain of wheat to burst open and who created living souls, all I know is based on the understanding God gives a man through the Qur'an":

> We heard from Ahmad ibn Maniʿ, who heard from Hushaym, who heard from Mutarrif, who heard from al-Shaʿbi, that Abu Hujayfah said, "I once said to ʿAli, 'O Commander of the Faithful, are you in possession of [sacred] writing that is not in the Book of God?' 'No,' he replied. 'By the One who causes the grain of wheat to burst open and who created living souls, all I know is based on the understanding God gives a man through the Qur'an ....'"[1]

God has affirmed to human beings that the Qur'an is sufficient for their understanding of their faith. The Qur'an contains within it the

* *Dr. Taha J. Alalwani is a graduate of Al-Azhar University and an internationally known scholar and expert in the fields of Islamic legal theory, jurisprudence (fiqh), and usul al-fiqh. He is also the author of numerous works and a Member of the OIC Islamic Fiqh Academy.*

Prophetic Sunnah, insofar as the Prophet was given the tasks of teaching humanity its signs in order for them to be purified and capable of being faithful to God's covenant, to carry out their duties as God's stewards on earth, and successfully pass through all the trials this earthly life brings their way.

The verses of the Qur'an, the clear Arabic language in which it was revealed and the Arabic language in more general terms, both bear witness to the fact that the Sunnah consists of the practical or applied aspect of the Qur'anic message. Hence, the Qur'an is the theoretical and the Sunnah the practical application. The Qur'an supplied the verbal aspects of the Divine Revelation, while the Prophet then applied and activated these aspects in people's day-to-day lives. As these applications were repeated in a variety of situations they formed precedents, which became part of the culture of the Islamic nation and its way of life. Although the first generation of Muslims is long gone, as is the era of the Companions' leading followers, nevertheless their vision was a clear one, in that they knew themselves to be charged with the task of clinging fast to the Qur'an and adhering both to the Prophet's understanding of the Qur'an and his applications of it in various circumstances. There is a clear and inseparable link between the Qur'an and what later came to be termed the Sunnah. Consequently, the Companions of the Prophet never encountered, either during or after his lifetime, any of the problems that later developed due to the emergence of various sects and schools of thought as well as the differences of opinion that arose among members of the Muslim community explicitly or implicitly.

If the early generations looked to the Sunnah, they did so in order to know how the Messenger of God applied the principle set forth in the Qur'an to the relevant issue. If there existed a saying or report seemingly on the authority of the Prophet which conflicted with the apparent meaning of the Qur'an or its overarching principles, they would not abide by it. Rather, they would abide by what they found in the Qur'an itself and consider the report or saying to have been distorted in some way at some stage of its transmission. Consequently, the scholars of Islam who came after them adopted the same approach their forebears had done. Imam Abu Hanifah, for example, rejected a hadith

whose chain of transmission he judged to be valid and according to which the Prophet had said, "no woman may marry without the consent of a legal guardian" because it conflicted with the explicit teaching of the Qur'an. As Abu Hanifah explained:

> I adhere to the explicit teaching of the Qur'an, which gives a woman the right to grant her own consent in marriage, saying, "And if he divorces her [finally], she shall thereafter not be lawful unto him unless she first takes another man for husband…" (*al-Baqarah* 2:230). Moreover, the Qur'an addresses women's former husbands with the words, "hinder them not from marrying other men if they have agreed with each other in a fair manner" (*al-Baqarah* 2:232).

Abu Hanifah took these Qur'anic verses as evidence of the permissibility of women to make a decision to marry without any need for a legal guardian. However other schools of jurisprudence which emerged in differing environments and circumstances gave the aforementioned hadith priority over the explicit teaching of the Qur'an to which Abu Hanifah had made reference. Imam al-Shafiʿi states in the introduction to his work, *al-Risalah*, that "no case shall present itself to the adherents of God's religion but that they will find guidance in the Book of God concerning how to approach it,"[2] either explicitly or implicitly.

The Sunnah enables us to see, through events that took place in the Prophet's time, the manner in which he applied the Qur'an's rulings to various life issues. Nevertheless, many people at a later stage ignited a debate whose effects are still being felt today, with the claim that anyone who rejected a hadith with a sound chain of transmission had thereby rejected the entire Sunnah and denied its authority. This is an extreme and exaggerated position which grew out of the dispute that had arisen among Muslims and in response to circumstances which there is insufficient space to detail here. Nevertheless, the founders of all the Islamic schools of jurisprudence refuted this claim reasoning that anyone who rejects a specific hadith based on (a) the invalidity of its chain of transmission (b) the lack of trustworthiness in the report actually resting on the authority of the Messenger of God, and/or (c) discovery of some irregularity or serious flaw in the body or text of

the hadith, would be correct. Thus, according to these scholars, the rejection of a hadith for any of the aforementioned reasons is the legitimate, undisputed right of all who engage in the process of ijtihad (independent reasoning).

ʿUmar ibn ʿAbd al-ʿAziz and his father before him issued instructions for all hadiths attributed either to the Prophet himself or to one of his Companions to be compiled and made available to the people. Their purpose in so doing was to deflect people's attention from the writings of Muslim scholars of jurisprudence in such a way that they would depend directly on the Sunnah itself as their source of understanding of the Qur'an, in order to be aware that some of the Sunnah consisted of fully documented hadiths that were traceable back to the Prophet, while the rest were attributed to his Companions, who had lived with him. In seeking to compile the *ahadith* neither of these men had intended to make the Sunnah into a text that possesses the authority to abrogate or qualify the Qur'an. Unfortunately, however, this is precisely what a number of later Islamic scholars have done.

When I went to live in the United States, I was surprised to discover that Muslim scholars coming to reside in the West were regrettably bringing with them, to a large degree, all the attendant baggage of the Muslim world's intellectual, doctrinal, juristic and other assorted problems, passed down through the centuries since the beginning of Islamic history. As a result, the people of the United States and Europe were being presented with an Islam that had been known and understood not in its pristine sense but by feuding dynasties over the course of history, dynasties such as the Umayyads, Abbasids, Talibiyyun (supporters of ʿAli ibn Abi Talib), Alawites and others. And this at a time when many in the West were looking for spiritual direction, searching for guidance to resolve their own myriad of problems, overcome their various crises, and simply have a greater purpose in life. Yet, unfortunately, the version of Islam being presented to them by a large number of Muslim migrants was not one seen through the lens of the Qur'an but rather one that mirrored the Islamic historical situation. This being the case, the indigenous population found itself faced with additional problems and crises, this time imported from an Islamic heritage that through the centuries had been corrupted either by enemy infiltration,

self-interest, or ignorant groups. Such developments had created a separation between the Muslims and the Qur'an and its teaching, the natural outcome of attempts to subject Qur'anic values and guidance to historical realities, including the prejudices associated with particular dynasties and tribes, traditions and customs, and the abuse and distortion of Islamic jurisprudence and even the reports passed down on the authority of the Prophet and his Companions in order to justify such practices and prejudices. This confused and controverting image of Islam, tainted as it was by various cultural practices and customs in Muslim countries and propagated by half-educated people, complicated the already inherent problems and crises making them worse if anything. Not surprisingly, it was not long before many Westerners who had shown an interest in Islam, turned away from it. As for many of those who did embrace the faith, they found the Islam presented to them one of a confused mix of juristic principles, inconsistencies, divergent and conflicting commentaries and interpretations, hadiths that contradict the Qur'an, and endless scholastic theological debates. Unfortunately, this created confusion and reluctance. Many Western scholars of Islam failed to discern the reasons for this alienation. One particular exception was Dr. Maurice Bucaille who managed to identify a number of them. When Bucaille read the Qur'an, he was able to see that the Revelation was capable of guiding human beings to a higher plane, and he was hard pressed to find a single flaw or inconsistency in it. However, when he began reading the hadith collections, he discovered a problem similar to that faced by Judaism and Christianity. In some of his writing Bucaille discusses these issues listing eight questions that had arisen in his mind upon reading the hadith collections, none of which had arisen when he was reading the Qur'an.

Toward Our Reformation raises issues similar to those presented by Maurice Bucaille as well as by many Muslims who have come to Islam from Jewish or Christian backgrounds. Bucaille attempted to pose his questions with the greatest respect and sensitivity, knowing that the issues he was raising are not tolerated by those who insist on attributing the demonstrable infallibility of the Qur'an and the Prophet to traditions handed down by Muslim jurists, and transmitters of hadith. For, those with such mindsets are unable to listen to anything that might

challenge their viewpoint, supposing as they do that those who raise and try to address certain controversial issues with regard to *ahadith* are in fact denying the entire Sunnah and its authority. What they fail to realize is that this type of inquiry and research is in fact a defense of the Sunnah and its place, a correction of its course, and a re-presentation of it to Muslims who have been influenced by a modern inquiring mind-set and universally recognized intellectual principles.

The Qur'an alone is capable of confronting today's challenges and in providing sound guidance to deal with them. Yet in order to bring people's lives on track, emphasis must be placed on the Prophetic approach to teaching the Qur'an to others.

When they rejected the hadith passed down on the authority of Fatimah bint Qays concerning divorced women's accommodation and alimony rights,[3] neither Imam Abu Hanifah, nor al-Shafiʿi, nor ʿUmar ibn al-Khattab were rejecting the Sunnah as a whole. Nor were they also rejecting the Sunnah when they rejected the hadith on *al-Diyyat* (blood money).[4]

Abu Hanifah was once asked:

> "What is your opinion of those who say that 'a believer who commits adultery or fornication has removed faith from his mind the way one removes a shirt from his body, though if he repents, faith is restored to him'?[5] Do you doubt the truth of what they say, or do you believe it? For if you believe what they say, you support the view of the Kharijites, whereas if you doubt it, you cast doubt on the Kharijites' views, and in so doing, you fail to apply the principles of fairness you yourself have promoted. If, on the other hand, you declare their statement to be false, they will say that in so doing you disbelieve the words of God's Prophet, since they have passed this statement down through a chain of narrators that goes back to the Prophet himself."

In response, Abu Hanifah replied:

> "I do declare what these people say to be false. In so doing, however, I do not disbelieve the words of the Prophet. Rather, disbelief in the words of the Prophet would entail a man's saying, 'I declare the words of God's Prophet to be false.' However, if someone says, 'I believe in everything

> the Prophet said, and that the Prophet never uttered falsehood or contradicted the Qur'an,' this statement is a statement of belief in the truthfulness of the Prophet and the Qur'an and a declaration that the Prophet could never have said anything that contradicted the Qur'an. For if the Prophet had ever done this or uttered any untruth, God would immediately have chastised him without delay in this world. As God has declared, ['']Now if he [whom We have entrusted with it] had dared to attribute some [of his own] sayings unto Us, We would indeed have seized him by his right hand, and would indeed have cut his life-vein, and none of you could have saved him! (*Surah al-Haqqah* 69:44-47)['']. But as a matter of fact, the Prophet of God never said anything at odds with the Book of God, and no one who does so could be a Prophet of God."

What the Kharijites say in fact contradicts the Qur'an, because when God speaks in the Qur'an in *Surah al-Nur* (24:2) about those who commit adultery or fornication, He does not deny that they are believers. Similarly in *Surah al-Nisa'* (4:16) He says: "Punish thus both of the guilty parties…" Those addressed in the two versus are the believing Muslims and not unbelievers.

Hence, rejecting the words of someone who transmits a hadith on the authority of the Prophet because it conflicts with the Qur'an is not a rejection of the Prophet, nor is it a denial of his truthfulness. Rather, it is a denial of the truthfulness of the person/s who transmitted the hadith or recognition of their confusion. Everything the Prophet *truly* said, even if we have not heard it ourselves directly from him, is something we cherish and believe in, and we bear witness that the Prophet of God never commanded anything God had forbidden, nor did he forbid anything that God had allowed, nor did he ever describe anything in any way other than the way in which God Himself had described it:

> Whoever pays heed unto the Apostle pays heed unto God ...
> (*Surah al-Nisa'*: 4:80)

The Prophet's life *and truly transmitted sayings* were in complete and utter harmony with God. And this fact should be preserved rather than distorted.

CHAPTER 1

Introduction

EFFECTIVE users of any product, service, idea or system are presumed to be informed, educated, intelligent and aware, possessing probing minds seeking answers to meaningful and relevant queries. This notion is equally applicable to religions and societies. And just as there exists variation in society's expectation over its informed and educated citizens, so the same variation in expectation extends to religions in terms of their informed, educated and enlightened adherents.

Islam places supreme emphasis on its followers being informed, educated, probing, discerning, and enlightened. Indeed, the Qur'an asserts that true faith is preceded by or based on knowledge and understanding:

> He it is Who has sent down to you the Book: In it are verses basic or fundamental (of established meaning); they are the foundation of the Book: others are allegorical. But those in whose hearts is perversity follow the part thereof that is allegorical, seeking discord, and searching for its hidden meanings, but no one knows its hidden meanings except Allah. And those who are firmly grounded in knowledge [*rasikhuna bi al-ᶜilm*] say: "We believe in the Book; the whole of it is from our Lord:" and none will grasp the Message except men of understanding [*'uli al-albab*].
> (*Surah Alᶜ Imran*, 3:7)

Thus Islam insists that believers exercise their critical faculties and not be senseless adherents. Further, it strongly repudiates those who

indiscriminately follow in the footsteps of their forefathers, blindly emulating without knowledge or understanding of what they are doing or practicing:

> When it is said to them: "Follow what Allah has revealed:" They say: "No! we shall follow the ways of our fathers." What! even though their fathers Were void of wisdom and guidance? (*Surah al-Baqarah,* 2:170)

> … for when they are told, "Come unto that which God has bestowed from on high, and unto the Apostle" – they answer, "Enough for us is that which we found our forefathers believing in and doing." Why, even though their forefathers knew nothing, and were devoid of all guidance? (*Surah al-Ma'idah,* 5:104)

The teaching of the Prophet is also unambiguous with regard to this, emphasizing the search for knowledge. Indeed, of all the concerns that are regarded as obligatory (*fard* or *wajib*) for Muslims, seeking knowledge and gaining an education is one for which the word *fard* has been specifically employed:

> Seeking knowledge/education is incumbent upon every Muslim – *talabu al-ʿilm* ***faridatun*** *ʿala kulli Muslim.*[1]

How ironic then that despite the great value placed on intellectual endeavor rates of illiteracy in the Muslim world stand at some of the highest known today. More importantly (general education aside) even fundamental knowledge and understanding of the Islamic faith, which Muslims are supposed to follow, uphold, and invite others to, has become negligible. One of the major reasons for this tragic state of affairs is the failure of common Muslims to develop within themselves a critical mindset, intellectually disciplined to think, reflect, judge, and reason. Even though a Muslim mind engaged in the search for God, the ultimate and only Truth and Reality, is per force an inquiring one, nevertheless the blindly imitative culture that many Muslims have inherited and that our traditional scholars have reinforced, has stultified this sense of inquiry.[2]

The Qur'an presents an eye-opening example in the form and experience of prophet Ibrahim (Abraham). The first thing of note is that prophethood in and of itself does not exclude asking God probing questions. In fact as the example of prophet Ibrahim indicates, God accepts such inquiries when accompanied by a positive attitude. Thus, in the following verse we see prophet Ibrahim even though he had attained prophethood petitioning God:

> Behold! Abraham said: "My Lord [*Rabb*]! *Show me*, how you give life to the dead." He said: "Do you not then believe?" He said: "Yes! but *to satisfy my own understanding*." He said: "Take four birds, tame them to turn to you; put a portion of them on every hill, and call to them; they will come to you (flying) with speed. Then know that God is Exalted in Power, Wise." (*Surah al-Baqarah,* 2:260)

Notably, God not only accepts this type of question to be asked of Him, but in fact assists prophet Ibrahim with the answer. This is the foundation of the Islamic spirit of inquiry: the search for truth and the pursuit of knowledge, understanding, and wisdom. Any genuine investigation of "truth," whatever form it takes, does not begin by taking things for granted, but rather by the effort to learn, understand, and, wherever relevant, verify – this is the very essence of the scientific approach. In this process, occasional doubt is only natural. Unfortunately, there is so much, including exclusive, emphasis on the virtue of conviction (*yaqin*) that for a truth-seeking Muslim mind room for doubt is rarely understood or acknowledged. The word "doubt" is generally considered and treated as something purely negative. However, this is contrary to the teaching of the Prophet Muhammad, the Islamic validity of which is contained in his words:

> Allah's Apostle said, "We have more right to be in doubt than Abraham when he said, 'My Lord! Show me how you give life to the dead.' He said, 'Do you not then believe?' He said, 'Yes (I believe) but to satisfy my own understanding' (*Surah al-Baqarah,* 2:260)."[3]

So purposeful inquiry as an aspect of critical thinking is welcome, historically forming an important component of the intellectual

mindset that was to lead Islamic civilization to its era of tremendous change and development. Blind adherence to others, or the deferring of knowledge and understanding – as a field – to a select, blessed few would have disqualified Islamic civilization from any level of achievement. The scholars, jurists, scientists and philosophers who lived and practiced during this period were not mere imitators but rather, imbued with the Islamic spirit of faith and a sense of awakening, were possessed of inquiring and probing minds, guided by the Qur'an, the Sunnah and real life experience. So we find that although to Imam Malik (d. 795 CE), Imam Shafiʿi (d. 820 CE) was his best student and to Imam Shafiʿi, Imam Malik was his best teacher, yet Imam Shafiʿi did not feel constrained in approaching anew issues extant in the field of law and jurisprudence.

Unfortunately, despite this great legacy and the fact that our noble scholars and jurists did not feel constrained in asking searching questions, as time wore on more scholars began to gradually feel comfortable thinking within the assumed paradigm, further exacerbated by the existence of a limited methodological toolbox re-emphasized over the centuries. Most educated Muslims know that the foundational sources of Islamic law are primarily four in number: the Qur'an, Hadith (prophetic narrations), Ijmaʿ (consensus) and *Qiyas* (analogical reasoning). The limitation of the methodological toolbox based on these foundational sources, as they have been traditionally utilized, is explored in this book.

Based on its commitment to justice, rule of law, freedom, human rights, moral values, and strong institutions, as well as other factors, the Islamic civilization led humanity in virtually all areas of human endeavor throughout a long period of history. Then, due to factors both internal as well as external, it began to become decadent. And as it declined, gradually, in a fiercely competitive, contested and even violent environment, western civilization came to dominate. As western forces ruthlessly colonized the Muslim as well as rest of the world, western laws and codes supplanted Islamic legal institutions and frameworks. As the anti-colonial movement became strong Islam once again played a vital role in reviving Muslim identity and aspirations. Unfortunately, this revivalist aspiration was in itself inadequate and

created a serious gap between the secular and religious segments of Muslim societies on the one hand, and between reformists and traditionalists (those professing orthodoxy) on the other.

Abdulhamid AbuSulayman, former Rector of the International Islamic University, Malaysia and author of several enlightening works, aptly sums up the condition of the Muslim world in his book *Crisis of the Muslim Mind*:

> There is general agreement that the Ummah is passing through an extremely difficult stage, one of disintegration and schism, loss of identity, failure of institutions, and inability to extract itself from its present state of bewilderment.[4]

This "state of bewilderment" to which AbuSulayman points is further exacerbated by the revivalist fervor to establish or implement the Shari'ah over the populace, often misconstrued and misrepresented as Islamic law. Even in countries that are constitutionally not based on religious law, the general culture and social environment is conditioned by the sway of Islamic law over the general Muslim population.

However, it is now widely acknowledged, even by Muslims, that in many areas related to modern challenges, parts of traditional Islamic law are no longer relevant or feasible. For example, dichotomizing the world between *Dar al-Islam* (the abode of Islam) and *Dar al-Kufr* (the abode of disbelief) is no longer tenable in societies with ethnically and religiously diversified populations. Furthermore, the concept of citizenship, which is increasingly accepted even by the traditionalist Islamic establishment, is at odds with many Islamic laws pertaining to minorities, including non-Muslims in an Islamic society. Then there are other traditional Islamic laws – apostasy and triple *talaq* (summary and irreversible oral divorce), for example – that are seriously at variance with not only simply modern times but also in reality, the pristine Islamic values themselves. Many such laws and the legalistic tendencies underlying them have robbed Islam of its liberating spirit:

> While it is true that Islam in its pristine form as propagated and practiced by the Prophet and his companions is liberating, it is not true that the

> 'Islam' we have today can offer any solutions to the problems of racial, gender, or class discrimination.[5]

As more and more Muslims are becoming better educated and informed about Islam, a sense of self-criticism is growing. After all, self-criticism is vital for any individual's moral and intellectual growth. It is also fundamentally important from the Islamic viewpoint. The pivotal concept of *Tawbah* (repentance) in Islam presupposes a self-critical perspective and attitude:

> Those that turn (to Allah) in repentance; that serve Him, and praise Him; that wander in devotion to the cause of Allah: that bow down and prostrate themselves in prayer; that command good and forbid evil; and observe the limit set by Allah; (These do rejoice). So proclaim the glad tidings to the Believers. (*Surah al-Tawbah*, 9:112)

The need for self-criticism has become more compelling as societies, over time, have become imitative of others and, hence, tradition-bound. Muslims are no exception. The Prophet clearly warned his beloved Ummah (community) about this ailment:

> Abu Sa'id Al-Khudri reported Allah's Messenger as saying: "You would tread the same path as was trodden by those before you inch by inch and step by step so much so that if they had entered into the hole of the lizard, you would follow them in this also." We said: "Allah's Messenger, do you mean Jews and Christians (by your words) 'those before you?'" He said: "Who else?"[6]

Thus, most Muslims do what they do and believe what they believe based not on first hand knowledge and the understanding of the two foundational sources, the Qur'an and the Sunnah (or even knowledge of the other two sources, Ijma' and *Qiyas*), but based on what they have been exposed to as part of the received heritage and culture. This has become a still bigger problem because, while Islam emphasizes a probing, inquiring and informed mind, the traditional environment emphasizes unquestioning conformity and adherence in general.[7]

This is not to say that everyone is repeating what has been repeated to them, for there are those Muslims who have nurtured independent-mindedness as an important component of their faith, seeking to give greater value to understanding and appreciation (with an Islamic attitude) rather than rote knowledge. I refer to this as the Ibrahimi mindset (mentioned earlier) and it bears its own fruit. Lest it be misunderstood, I stress that being independent-minded does not mean being disrespectful of the past or the contemporary contributions of scholars. In the attempt to better explore and understand various issues of life – social, economic, cultural, political, legal, theological, scientific, etc. – from the Islamic perspective it has been important to actively engage in interactive cyber-dialogues with academics, intellectuals and professionals. This has led to the conviction that the requisite understanding is not possible without some essential knowledge and appreciation of the foundational sources of Islam. As the call for the re-establishment of the Shari'ah has become a divisive issue in Muslim societies, coupled with the fact that the Shari'ah is often misunderstood as Islamic Law, it is imperative that Muslims educate themselves with regards to the foundational sources of Islam to better understand the relevant issues facing them and thereby to better be able to guage the solution.

Unfortunately, most existing academic works pertinent to the subject are far too lengthy and advanced for the lay Muslim, requiring a degree of prerequisite preparation, which he/she may neither have the time or ability to give. One example is the highly recommended *Principles of Islamic Jurisprudence* by Muhammad Hashim Kamali[8] (a notable contemporary scholar and academic at the International Islamic University, Malaysia). For serious readers, or those with academic interests, it is an excellent work, fairly comprehensive and illuminating. For the general Muslim reader on the other hand it may appear far too advanced or serious, and therefore daunting to read, discouraging them from the attempt. Several other works, such as *Introduction to Shari'ah and Islamic Jurisprudence*[9] by Mohammad Akram Laldin, lack depth. Muhammad Yusuf Guraya's *Islamic Jurisprudence in the Modern World* is insightful, yet unduly critically focused on Maliki fiqh without ever acknowledging or explaining its preoccupation with the critique of Maliki fiqh only.[10] Anwar Ahmad Qadri's *Islamic*

Jurisprudence in the Modern World is another descriptive work.[11] Imran Ahsan Khan Nyazee is a highly reputed contemporary scholar. His *Islamic Jurisprudence (Usul al-Fiqh)* is a contemporary textbook on the subject.[12] Unfortunately, in my opinion it is again more descriptive than analytical, having hardly anything enlightening to offer the student of the field, let alone the general reader. In short, it fails to add any critical insight to the problem of Islamic Jurisprudence and why Islamic law often and generally has become asynchronous with contemporary reality.

Michael Mumisa's *Islamic Law: Theory and Interpretation*[13] is one of the few well-written books containing a substantive critical evaluation of Islamic law and jurisprudence. Thus, it is highly recommended. However, it is not clear whether the work's abrupt framing of the pertinent discourse in terms of Liberation Theology, apparently turning the author into an advocate of Islamic Liberation Theology, has enhanced the work or added confusion to readers' minds. The best contemporary text on Islamic Jurisprudence – in the English language – remains Kamali's, which has been acknowledged by all later scholars. However, its critical, evaluative aspect is meaningful, but not substantive. Almost all other works, except Mumisa's, lack any substantive critical evaluation of the field of Islamic law, and especially ignore many negative aspects or implications. Furthermore, all the works cited above, including that of Kamali and Mumisa, are text-oriented in a literal sense, a serious problem that is explored in Chapter Six.

This book consists of five core chapters. Chapter Two focuses on the Shari^{c}ah and explores issues concerning misconceptions about the term as well as the propensity towards legalism. The latter is explained at length, followed by a discussion on value-orientation and its importance. Chapter Three focuses on Hadith, examining certain vital issues pertaining to the subject, identified and explained with ample illustration, concluding with the documentation of the problems concerning the misuse of Hadith in deriving or formulating laws. Chapter Four deals with the subject of Ijma^{c}, where most of the claims concerning it are demonstrated to be unfounded and untenable based on a consistent lack of consensus regarding almost *all* aspects of Ijma^{c} as a source of Islamic jurisprudence. Chapter Five, on *Qiyas*, deals with the many

conceptual problems and disturbing examples of the misapplication of this tool in Islamic legal promulgation. Thereafter, Chapter Six deals with a pivotal aspect of Islamic law and jurisprudence, namely the fact that Islamic law and jurisprudence lacks an adequate empirical foundation, "empirical" in today's sense.

This book is the product of independent inquiry in Islamic law and jurisprudence. However, everything presented here is duly and painstakingly documented from the works of pertinent scholars and experts. The work is illustrative of how such an inquiring approach can be applied in a constructive manner. It is a past-enriched perspective that is respectful of what has been accumulated as knowledge and wisdom over the centuries, every bit as much as it aims to be forward-looking in regard to provoking a discourse that hopefully will usher in a better future.

Further, this book is intended to empower ordinary Muslims to better understand the issues and problems affecting them from an Islamic perspective by demonstrating the ways in which they can more effectively link with the Qur'an and the legacy of the Prophet to chart a superior future for the Ummah to better serve humanity. Just as AbuSulayman reminds all such interested parties "nothing will change unless we rectify, before all else, the ways in which we think."[14] This author humbly contends that the prevailing conditions of the Ummah are not expected to change unless our thoughts and understanding about the foundational sources of Islam also change in the first instance.

The author strongly asserts that if readers, imbued with Islamic spirit, approach this book with an open mind they will be provoked to think and probe further, and thus enrich themselves. One central theme underlying this work is that the essential sources of Islamic guidance are the Qur'an and the legacy of the Prophet. Muslims are to be respectful of and must take into consideration the opinions of our pious and capable ancestors, including their valuable contributions. However, we are not to imitate their thoughts and contributions if in conscientiously understanding, interpreting or practicing Islam in the contemporary era, fresh thoughts and solutions are required; this

applies as long as we sincerely seek guidance directly from the Qur'an and the legacy of the Prophet – then and only then.

Mohammad Nejatuallah Siddiqi, a pioneering Islamic economist, who also kindly wrote the Foreword to this book, aptly articulates the same Islamic ethos, relevant to our contemporary time. After decades of contributing to the field of Islamic economics and finance, he too came to the realization that blind application of classic opinions not relevant to today's world can cause our laws to deviate from the *Maqasid* (higher goals, purposes, objectives, or principles) of Islam. Thus he too has issued a call for a return to the primary sources of Islam, the Qur'an and the prophetic legacy, as well as reconnection to the *Maqasid*, when recalling classic opinions. Despite our personal differences over some key issues concerning Islamic economics and finance, there is much inspiration to be gained by his illuminating discourse on the subject. Particularly impressive has been his invitation to the new generation of Muslims:

> … every man and woman must be encouraged to seek guidance directly from the source is the novelty of the situation in which we find ourselves. Nothing similar ever occurred in history. ***We need unfettered exercise of human ingenuity. We need untutored reading of the sacred texts.*** For these two are the only sources of fresh ideas and new guidance suited to meet the challenges of change: the word of God and the human capacity to think, observe, imagine and intuit…Religious mentors who deny these sources to the common man, claiming a monopoly of these sources, commit the gravest of all sins. They have no right to do so. They do not have a divine mandate for appropriating the role of interpreting God. Nor can they justify their claim that they are better equipped for intellection and intuition than other people.[15]

It is with this unfettered, but constructive, Islamic spirit that all respected readers are invited to join in exploring the issues concerning these vital topics; vital because they are affecting not only the Muslim world, but humanity itself, and because the Ummah has been created for humanity, (*Surah al-Nisa'*, 3:110). Readers are urged to reserve judgment until they have completed a dispassionate reading of the book.

Certain elements will be painful reading no doubt, however it must be emphasized that they are not the result of the author's own imaginings but rather seek to serve as a mirror to the real world in which we as Muslims live and to highlight the challenges to which we must rise. It is the author's earnest hope that this work will not be merely construed as faultfinding or slander because it is written in the spirit of self-criticism. As an active part of this Ummah the author deserves a share in its joy, hope, success and optimism, as much as deserving a portion of its sorrow, grievance, failure and stagnation. No criticism of any individual scholar or group or nation should be taken in isolation to avoid being judgmental. However, specific lapses, weaknesses, or errors of any individual should be approached with the spirit of learning and noone should be evaluated on the basis of their shortcomings without taking into consideration their overall valuable contribution to the field of scholarship as well as through their pious, noble and exemplary life.

Our *ʿulama'* and jurists, more often than not, were valiant defenders of the Ummah and its conscience:

> [T]he lot of the great ulama, especially those four who founded the schools of legal thought, consisted of torture and exemplary punishment. Imam Abu Hanifah [d. 767 CE] died in prison because he refused to accept a position as a judge in a regime that was not committed to Islam. When Imam Malik [d. 795 CE] opined in favor of the invalidity of *talaq* pronounced under duress, he was beaten so badly that his hand was paralyzed. Likewise, Imam Ahmad ibn Hanbal [d. 855 CE] was forced to undergo a great deal of suffering for his opposition to the political ambitions of those in power. Imam al-Shafiʿi [d. 820 CE] was forced to flee from the authorities in Baghdad after he had to take refuge in Egypt, far from the center of power.[16]

The issues raised in this book have not been identified because of their polemical importance. Rather, the real problems and challenges facing the Muslim world – poverty, deprivation, illiteracy, instability, authoritarianism, exploitation, injustice, economic inequality, violence, human rights deviations, women's rights deficiencies, technological and economic backwardness, dependence on the West and so on – do not make for a happy picture. There must be a reason and there

has to be a solution. Muslims should be familiar with the notion of believers being a mirror to each other. It is expected that the reader will proceed into the following chapters with this spirit in mind:

> The Prophet said: "The believer is the believer's mirror, and the believer is the believer's brother who guards him against loss and protects him when he is absent."[17]

Regardless of what the mirror reflects back towards us and toward our reformation (*Islah*), we must always bear in mind the following:

(a) As human beings, we have enormous potential to change our lives, and the Qur'an emphatically reminds us that we must do our part in initiating change, beginning with ourselves (*Surah al-Raʿad*, 13:11).

(b) Equipped with the balanced and wholesome guidance contained in the Qur'an and the legacy of the Prophet, we can overcome any deficiency we have or challenge we face.

(c) We all should have the desire to make a positive difference to the world in which we live in the spirit of *Islah* (betterment). As the Prophet Shu'aib so caringly addresses his people:

> O my people! … I only desire (your) betterment (***islah***) to the best of my power; and my success (in my task) can only come from Allah. In Him I trust, and to Him I turn. (*Surah Hud*, 11:88)

CHAPTER 2

Shari^{c}ah, Law and the Qur'an: Legalism vs. Value-Orientation

(I) INTRODUCTION

HISTORIANS have often wondered at the remarkable success that Islam and the Prophet Muhammad achieved in forming a new society. So astonishing and exceptional was this pace of development that it is no exaggeration to say, the Islamic community rapidly evolved into one of the greatest civilizations known to man. Stoddard, an American historian acknowledges the historical accuracy of this when he writes:[1]

> The rise of Islam is perhaps the most amazing event in human history. Springing from a land and a people previously negligible, Islam spread within a century over half the earth, shattering great empires, overthrowing long established religions, remoulding the souls of races, and building up a whole new world – the world of Islam. …

The closer we examine this development the more extraordinary does it (Islam) appear. The other great religions won their way slowly, by painful struggle, and finally triumphed with the aid of powerful monarchs converted to the new faith:

> Christianity had its Constantine, Buddhism its Asoka, and Zoroastrianism its Cyrus, each lending to his chosen cult the mighty force of secular authority. …

> Not so Islam. Arising in a desert land sparsely inhabited by a nomad race previously undistinguished in human annals, sailed forth on its great adventure with the slenderest human backing and against the heaviest material odds. Yet Islam triumphed with seemingly miraculous ease, and a couple of generations saw the Fiery Crescent borne victorious from the Pyrenees to the Himalayas and from the desert of Central Asia to the deserts of Central Africa.[2]

The confrontation and challenges posed by the then existing powers provided the context for the new society to expand its territories. In size and influence, the community grew at breakneck speed in accordance with two main processes: a) Muslim representatives travelled across the world, inspired with a vision to spread the message of Islam far and wide. This was facilitated by the Arabs' own experience as traders both before and during the days of the Prophet, as well as by Islam's emphasis and praise of trade and business as a virtue. As they ventured across lands and seas many Muslims developed trade contacts with, and sometimes even settled in, other parts of the world. Thus trade and propagation came often to be inseparable. b) As the Islamic polity defined itself, consolidated, and rose to dominance, many faithful, as well as people of other beliefs from around the world, migrated to the diversified Islamic nation to enjoy the fruits of its peace, security and prosperity. The universalist community of Islam no longer Arab racially, attracted people from around the world: Bilal (a slave) from Abyssinia (now Ethiopia), Salman from Persia, and Suhayb from Rome, for instance.[3]

Despite the periodic ups and downs that occurred as a result of various internal/external tensions and conflicts, the Islamic polity managed to maintain its pluralistic orientation. Muslim rule in Spain for instance, referred to as *La Convivencia* (the coexistence), is a good illustration of the successful realization of Islam's pluralistic vision and dynamic creed. Three of the greatest personalities of the Abrahamic faiths (Islam, Christianity and Judaism) hail from this period and environment: Averroes (Ibn Rushd, Islam), Maimonides (Judaism) and Thomas Aquinas (Christianity):

> Averroes, Maimonides, and Aquinas lived during a time of unprecedented and reciprocal spiritual intellectual and cultural exchange between Islam, Judaism, and Christianity, specially during the so called "Golden Age of Muslim Spain" that continues to inspire, both by its high level of civilization and its tolerance.[4]

Islamic Spain attracted Europe economically and intellectually. European scholars and students visited and studied at the institutions of higher learning there enabling the European Renaissance to take root later on. Gradually, the fate of the entire Islamic civilization changed as western civilization rose to prominence and the Muslim world succumbed to decadence. In the ensuing confrontation between Muslims and the West, the West prevailed victorious and dominant.

Indeed, today the center of human civilization has shifted so completely away from the Muslim world to the West, that it is Muslims who now migrate to it, attracted by various aspects, where once it was the other way round. Correspondingly non-Muslims seldom move to the Muslim world.

Indeed, the more a Muslim-majority country[5] leans toward traditional Islam by way of implementation of the Shariʿah, for instance, the more the West becomes anxious. Additionally, many Muslims who reside in these respective states also seem disillusioned, impatient or agitated:

> In the West, the idea of Shariah calls up all the darkest images of Islam: repression of women, physical punishments, stoning and all other such things. It has reached the extent that many Muslim intellectuals do not dare even to refer to the concept for fear of frightening people or arousing suspicion of all of their work by the mere mention of the word.[6]

What does this mean? Is the world, including the Muslim world, better off without the Shariʿah? Has it reached a state whereby just as some people have sought to banish the word "Jihad" from the Muslim vocabulary[7] others may soon suggest that the "Shariʿah" be banished from the lexicon as well? However much some may champion the idea of eliminating the Shariʿah altogether however, the question

remains does the public image of the Shariᶜah stem from knowledge of its inner workings or rather the abuse it has suffered at the hands of governments/leaders bent on using it for their own ends? It is still the case that a concept can be distorted by way of misperception, misunderstanding, misapplication, or misuse in which case the solution is not simply to discard the notion or term altogether but rather to purge it of misunderstanding, clarify the abuses, and ensure that the praxis of faith conforms reasonably and conscientiously to the claimed ideals:

> It is true that scholars of law and jurisprudence have almost naturally restricted the meaning to their own field of study, that dictators have used for repressive and cruel purposes, and that the ideal of the Shariah has been most betrayed by Muslims themselves, but this should not prevent us from studying this central notion in the Islamic universe of reference and trying to understand in what ways it has remained fundamental and active in the Muslim consciousness through the ages.[8]

While Islam under the leadership of the Prophet instituted liberation and freedom from human bondage, ushering in scientific, technological, economic and cultural progress as part of a dynamic civilization, the Shariᶜah, *as presented and implemented today*, seems to do (and probably promises more of) precisely the opposite. Why is this so? Why is it being abused, misapplied and used for personal gain without more concerted attempts at appreciating it for what it is? It is the contention of this chapter that there exists a fundamental misunderstanding concerning Islam and the Shariᶜah whereby the latter is being used to rubber stamp extremist, violent behavior, the abuse of women, and the unfair control and imprisonment of human beings. It behoves all scholars therefore to address this rampant abuse and restore the Shariᶜah to the high Islamic ideals and inner spirit which undeniably define it, and which once made it a vehicle of real justice. The issue is compounded by a general populace that has lost touch with knowledge of Islam and the Shariᶜah, adding to their misunderstanding of both. The need to address the issue therefore is vital and this on a number of fronts, not only for the sake of human rights as such but also for the fact that there are those particularly in the media who ruthlessly

exploit abuse of the Shariʿah to denigrate Islam and link it to violence and barbarity.

In sum it is my contention that while the notion of the Shariʿah has not become irrelevant, it has to be cleared of the gross misunderstanding and distortion which currently weigh Islam down.

(II) SHARIʿAH VS. FIQH: CONTEMPORARY ATTEMPTS AT IMPLEMENTATION

Before examining what Shariʿah is and what it is meant to represent, let us look in a little more detail into the misapplication and abuse it has been subject to in recent times. The Shariʿah has been implemented, or in some cases rather pseudo-implemented, on a national level in certain countries of the Muslim world. What has been the result?

Primarily, there seems to be an underlying pattern to these national Shariʿah experiments: first, they tend to be associated with dictatorial, authoritarian or hereditary rule of an individual or a group that is self-imposed. Second, Shariʿah has basically meant the institution of *hudud* punishments intended to implement Shariʿah law by enforcing punishments mentioned in the Qur'an and Sunnah. In practice these are a sham as well as a gross violation of the spirit of justice that Islam demands. It is no surprise therefore that Islam-prescribed punishments for serious offenses, civil and religious, have been meted out, in a system where the rule of law and independent judiciary are both absent and corruption/abuse of law enforcement institutions rampant. Eliminating interest has been another sideshow often disguising the nature of *riba* in novel ways and bringing it in through the back door. Such changes in form rather than in substance have not improved the economy collectively or individually.

One of the basic principles of Islam is that no one – absolutely no one – is above the Shariʿah. However in practice we often find application only reserved for the general, largely poor, populace with those in power or the wealthy immune. Such implementation of Shariʿah is nothing more than Islam turned on its head. Or the labeling of something the public would ordinarily object to as wrong by claiming it is sanctioned by Islam! It would not be wrong to surmise that the

Shariʿah has become little more than a tool to gain popular consensus for unpopular practices.

Not all is so stark however for there are some cases of Shariʿah implemented in countries with somewhat representative governments and a more pluralistic vision of society. Yet, even in countries where Islamic laws and values are taken seriously without compromising commitment to pluralism or economic prosperity, it still falls far short of the ideal realized in the 6th Century.

Thus, quite understandably by and large distracting the populace whilst neatly side stepping issues of poverty, economic development and welfare programmes etc. has meant that Shariʿah is being used as little more than a panacea and has become synonymous not with Islamic values and principles, but almost exclusively with harsh penal laws or ordinances, whose common victims are people with limited power in society. Illustrative is the Hudood Ordinance implemented for adultery which has in places resulted in the outrageous imprisonment of thousands of rape victims with the ever-present possibility of conviction for even capital punishment.[9] We cannot allow the Islam to be violated in this way.

These circumstances call for the importance of possessing a qualitatively better understanding of the concept of Shariʿah. This is especially so because the Shariʿah mentioned in the Qur'an and Hadith is much broader and more generic than the confines to which it is now commonly implemented and is to be defined by its spirit of justice and not the mere enforcing of rules:

> If the idea of 'establishing rules' is indeed contained in the notion of Shariah (from the root sha-ra-a), this translation does not convey the fullness of the way it is understood, unless its more general and fundamental meaning is referred to: 'the path that leads to the spring.'[10]

Understanding the term 'Shariʿah' is now more important than ever because its traditional formulation, which is exemplified in the abuse and misapplications taking place in society, has failed to meet Muslims' expectations of Islam, to guide them and solve their problems; in addition, it has polarized societies to negative extremes:

> The weakness of the traditional construction of Shariah in meeting social expectations stresses the need for a fresh quest for the normative basis. Consequently, Muslim views on the position of Shariah in Muslim polity have become increasingly polarized between secularist and traditionalist viewpoints.[11]

(III) WHAT IS SHARIʿAH? PERCEPTIONS AND MISPERCEPTIONS

> For, there can be no doubt that the true Shariah (as propounded by the Qur'an and the Prophet and understood by his Companions) is now almost hidden in a maze of scholastic views and deductions – a superstructure of subjective opinions accumulated in the course of centuries and now clothed in the garb of fictitious "authority".[12]

Is there a true Shariʿah, as argued by Muhammad Asad? While we explore the related issues in this chapter, a puzzle lingers: Why does the notion of the Shariʿah wield such a commanding hold over both traditional and revivalist Muslims, in particular their religious scholars, establishments and movements? Historically, it is central to the Muslim understanding of the relationship between Islam and law:

> Law is the primary religious science in Islam. Once committed to Islam, the believer's overriding concern and question is 'What do I do; what is God's will/law?' Law is essentially religious, the concrete expression of God's guidance (Shariah, path or law) for humanity. Throughout history, Islamic law has remained central to Muslim identity and practice, for it constitutes the ideal social blueprint for the 'good society.' The Shariah has been a source of law and moral guidance, the basis for both law and ethics. Despite vast cultural differences, Islamic law has provided an underlying sense of identity, a common code of behavior, for Muslim societies. As a result, the role of Islamic law in Muslim society has been and continues to be the central issue for the community of believers. For the early Muslim community, following the Shariah of God meant obedience to God's continuing revelation and to His Prophet. Issues of worship, family relations, criminal justice, and warfare could be referred to Muhammad for guidance and adjudication. Both Quranic teaching and Prophetic example guided and governed the early Islamic state. With

> the death of Muhammad, divine revelation ceased; however, the Muslim vocation to follow God's will did not. Knowledge and enforcement of God's law were continuing concerns.[13]

The view presented above is a general one. Practical experience has, however, proved quite complex. This is because, while following God's guidance in the form of laws and codes is binding, His guidance, as embodied in the Shari^{c}ah, is not crystal clear in terms of its comprehensiveness and definitiveness. God's revelation, as contained in the Qur'an, did not come to humans as a codified packaged legal manual. Instead, the laws required ascertaining and interpretation by fallible human beings:

> The literal meaning of Sharia is 'the road to the watering hole,' the clear, right, or straight path to be followed. In Islam, it came to mean the divinely mandated path, the straight path of Islam,that Muslims were to follow, God's will or law. However, because the Quran does not provide an exhaustive body of laws, the desire to discover and delineate Islamic law in a comprehensive and consistent fashion led to the development of the science of law, or jurisprudence (*fiqh*). *Fiqh,* 'understanding,' is that science or discipline that sought to ascertain, interpret, and apply God's will or guidance (Sharia) as found in the Quran to all aspects of life.[14]

While God's guidance is believed to lead society towards better justice, harmony, and balance, this begs the question why is it that the hitherto experience of those countries experimenting with the application of the Shari^{c}ah has proven so deplorable? Wherein lies the fault and whose is it? One answer is that the authority and sheer force of the ruling junta or dynasty has prevailed. Thus, it would be inaccurate to allege that people lend these forms of 'Shari^{c}ah' much support and weight. Another is that our own lack of critical study of Shari^{c}ah or what is presented in its name has allowed various unacceptable manifestations of it.

In reality, the traditional Muslim masses are rightly attached to Islam. However, consistent with human nature which seeks freedom, security, peace, justice and prosperity, the masses are not in conflict with Islam because it is essentially dynamic, progressive and balanced.

The Muslims desire Islam, but not as an impediment to their lives; they recognize that Islam can neither be against human nature nor against their interests and aspirations. The Afghans, for instance, are deeply religious from a traditional perspective. Even the Taliban rule was deemed by them an unbearable infringement of their fundamental human dignity and rights. Since its inception Pakistan has been an "Islamic Republic" and its people are attached to their faith. Regardless, Pakistani society has become secular, some sections more than others, some in protest over the aggressive fanaticism of the nations' self-proclaimed guardians and authorities in the name of Islam. Another reaction reflective in Muslim countries has been for people to adhere to Islam but not to allow it to influence their lives, especially in a more structured form, which is often identified as Shariʿah. Without question, the Muslim masses have little appetite for the type of Shariʿah imposed on them by corrupt, power-grabbing dictators and self-serving monarchies.

However, it must also be acknowledged that, due to the Muslims' deep attachment to their religion, anything presented to them as being divine and binding renders them vulnerable to manipulation.

In this context, the notion that the Shariʿah is divine and immutable has great relevance. If divine, then the guidance from Allah must be treated as sacred, immutable and thus binding upon His followers. Anything originating from Allah cannot be viewed in any other way. However, what exactly constitutes the designation *divine* and what is meant by the term Shariʿah requires clarification. When the issue is explored in depth curious anomalies and discrepancies arise. It is indeed common to argue that the Shariʿah is divine and immutable, as demonstrated in the passages below:

> The Shariah includes both faith and practice. It embraces worship, individual attitude and conduct as well as social norms and laws, whether political, economic, familial, criminal or civil.
>
> It may also sometimes be used to imply, in a more restricted sense, dos and don'ts – the rules and regulations for conduct and behavior. Lastly, it is also used as the equivalent of the Islamic laws.

The Shariah is thus nothing less than the *divinely ordained way of life* for man. T*o realise the divine will, man must follow the* Shariah. To live in Islam is to live according to the Shariah. To give up the Shariah or any part of it knowingly, willfully or deliberately is to give up Islam. A Muslim must therefore do his utmost to observe and to implement the whole of it, wherever and in whatever situation he finds himself. *Hence the Muslim insistence, persistence, commitment and passion for it.*[15]

The eternal and unchanging: The Shari`ah is for all times to come, equally valid under all circumstances. *The Muslim insistence on the immutability of the Shari`ah* is highly puzzling to many people, but any other view would be inconsistent with its basic concept. *If it is divinely ordained, it can be changed by a human being only if authorised by God or His Prophet.* Those who advise bringing it into line with current thinking recognise this difficulty. Hence they recommend to Muslims that the 'legal' provisions in the Qur'an and the concept of the Prophet as law-giver and ruler should be 'downgraded.'

But, as the manifestation of God's infinite mercy, knowledge and wisdom, the Shari`ah cannot be amended to conform to changing human values and standards: rather, it is the absolute norm to which all human values and conduct must conform; it is the frame to which they must be referred; it is the scale on which they must be weighed.[16]

Laws are therefore an important and integral part of the Shari`ah and, as we have already noted, it admits of no distinction between its parts: *'to pray' is as valid, enforceable, obligatory* and sacred as 'to consult in collective affairs' or to 'prohibit interest'....[17]

In Arabic, Shariah means the clear, well-trodden path to water. Islamically, it is used to refer to the *matters of religion that God has legislated* for His servants. The linguistic meaning of Shariah reverberates in its technical usage: just as water is vital to human life so the clarity and uprightness of Shariah is the means of life for souls and minds.[18]

Finally, when mankind had reached the stage of intellectual maturity and was ready to receive the last message from Allah Subhanahu wa Ta'ala, Islam came with its *complete, comprehensive, and eternal Shariah (law)* for the whole of mankind.[19]

With the death of the Prophet Muhammad in 632, communication of the divine will to man ceased so that the terms of the divine revelation were henceforth fixed and immutable. When, therefore, the process of interpretation and expansion of this source material was held to be complete with the crystallization of the doctrine in the medieval legal manuals, Shariah law became a rigid and static system.[20]

Therefore, when He issued His law, the Shariah, He made it suitable for all times and communities. Otherwise, He would have indicated that this law would be subject to amendment, and would have outlined the procedure for such amendment. What all this means is that *no legislative, executive or judicial authority has the power to amend God's law*, which must be implemented in full.[21]

The Shariah is the *divinely ordained code of behaviour* that dictates the way of life for mankind.[22]

Since the Kingdom [of Saudi Arabia] has adopted Islam, in word, deed and belief, as its mode of life, its society is based on firmly established principles *derived from the provisions of divine revelation*, which still constitute the cornerstone of Islamic civilization. Its system of government is based on justice, consultation, equality and a desire to ensure the proper *application of the Islamic Shariah in all its aspects*.[23]

While *Shariah law is sacred and immutable*, fiqh is human science.[24]

... *Shariah is just another name of Islam* and a pattern of thought and action given by Islam, ... It should also be clear that there are no versions of Islam. It is a Deen revealed by Allah and a way shown to us by the Prophet (peace be upon him). *It is complete code of life* and presents solutions to all matters and the problems of life. ... *Islam provides clear and unambiguous guidance for life*.[25]

Shariʿah = Islamic Law.[26]

Equating the Shariʿah to Islamic law is not limited to laymen, journalists, or demagogues. Evidence of the pervasiveness of this view

appears in the works of even the highly reputed scholars who are committed to transforming Muslim thought patterns. For example, *Imam Al-Shatibi's Theory of the Higher Objectives and Intents of Islamic Law*, which introduces the seminal contribution of this important scholar, is a valuable work that has recently been published through a major Islamic institution. Among the institution's aims are two noble and grand objectives.

1) To reform Muslims' ways of thinking and to reorder and reformulate their priorities.

2) To rebuild the Islamic cultural scheme and to present modern humanistic and social knowledge from an Islamic perspective.[27]

A well-known contemporary scholar wrote the introduction to this book by stating:

> The most important and salient means by which scholars sought to achieve this goal was that of elucidating the objectives of Islam, the causes behind Islamic legal rulings as well as the intentions and goals which underlie the *Shari*ᶜ*ah, or Islamic Law*.[28]

Masudul Alam Choudhury is a noted scholar and prolific author in the field of Islamic economics and finance. An advocate of *Tawhidi* methodology as well as The Universal Paradigm[29] and a strong critic of contemporary Islamic economics and finance, Choudhury equates the Shariᶜah with Islamic law:

> To this class belong the high watermarks of the *mujtahid*, who have derived and developed the Islamic Law, the *shari'a*, on the premise of the Oneness of Allah as the supreme knowledge.[30]

Another noteworthy example hails from a leading text on Islamic jurisprudence by Nyazee. Under the heading "Distinction between *shari'ah* and *fiqh*," the author contradicts himself while trying to emphasize the distinction between the two terms and ends up equating the Shariᶜah with law:

> There is a difference between the meaning of the terms *shari'ah* and *fiqh*. Yet, these two terms are often used interchangeably. The differentiation, however, indicates that the term *shari'ah* has a wider meaning than *fiqh*. The term *shari'ah* includes both law and the tenets of faith, that is, the '*aqa'id*. The real distinction between *shari'ah* and *fiqh*, however, is that *shari'ah* is the law itself, while *fiqh* is a knowledge of that law – its jurisprudence.[31]

The above is illustrative of the deeply entrenched legalistic mindframe that make Muslims persist in viewing Islam and the Shariʿah through the lens of law.

The quotations above happen to be contemporary. Their choosing is due to the fact that quite often, people's applied efforts are a reflection of their contemporary understanding, regardless of what may have been the formulations of the past. Another, more important reason, is that the later period of classical Islamic discourse employed the term Shariʿah without explication, in the probable assumption that the term was known and understood:

> While the Sharia may be defined in a variety of ways, no definition that seeks to do justice to medieval Muslim thought can do without the key concept of *ahkam*, rendered here as 'categorizations.' The Shariah is, first and foremost, the totality of divine 'categorizations of human acts' (*al-ahkam fi'l af'al, al-ahkam al-'amaliya*). The medieval Muslims were in fact much more concerned with the explication of the concept of a divine categorization of an act than with the explication of the concept of the Sharia as such. Indeed, *in many of their most renowned writings one does not find any discussion at all of the latter concept, whereas discussions of the former typically take up many pages*. Frequently, rather than speaking simply of the Sharia, Muslim scholars would speak of 'Sharia categorizations' (*al-ahkham al-shar'iyyah*).[32]

Weiss' observation that the term Shariʿah was not the subject of discussion in the earliest Muslim writings is in the context of his book based on the work of the eminent classical jurist Sayf al-Din al-Amidi (d. 1233 CE).[33] Even though the notion of its definition was absent in the earliest of classical discourse, the use of the term Shariʿah has only

become widespread in the modern era. Below are some of the main attributes culled from recent descriptions of the term.

a) The Shariᶜah is divine.
b) The Shariᶜah is immutable.
c) The Shariᶜah is the same as Islam and it is a "complete code of life."
d) The Shariᶜah is the same as Law.
e) The Shariᶜah is enforceable [without any distinction between prayer or crimes].
f) The Shariᶜah [Islam] provides "clear and unambiguous" guidance for life.

This list is helpful in exploring both what is understood by the term Shariᶜah and how it is misunderstood; each will be analyzed in turn.

IS THE SHARIᶜAH DIVINE ?

One of the areas I will now touch upon and which is sensitive is the issue of whether the Shariᶜah is divine.[34] What do we mean by this term and why discuss it? Partly because the idea itself is used to impress upon the common man with his simple understanding of Islam that the Shariᶜah is equivalent to the Qur'an, is to be obeyed and not necessarily to be understood, and partly because it has led to a confused understanding of Islam in general and the Shariᶜah in particular. Before discussing the divinity of the Shariᶜah let us understand how it is formulated. Shariᶜah is composed of three main elements:

1) Injunctions taken from the Qur'an.
2) Injunctions taken from the Sunnah of the Prophet.
3) Deductions/Reasoning of *fuqaha'* based on the Qur'an and the Sunnah and interpretation of scholars.

The directives of the Qur'an and the Sunnah, from the latter especially those aspects that are considered universally applicable or transcending over time and place, cannot be changed and in this sense they are divine. However, due distinction must be made between

Sunnah and Hadith, as the former is authenticated by the latter and in this regard Hadith as a source to identify and establish various Sunnah requires authentication. But, even more importantly, it is the third aspect that of deduction and ijtihad which is not divine. As Muhammad Asad points out the great scholars of Islam of the early generations "never made any claim to finality."[35] They applied the two sources of the Qur'an and the Sunnah and their love and depth of knowledge of these to derive rulings which they prayed were the intentions of the Lawgiver. As Asad remarks, Imam Abu Hanifah stated that "If you find in my words anything that conflicts with the Sunnah of the Prophet throw my words to the wall and keep to the Sunnah"[36] which shows that they felt their words were not binding.

Having stated this, let us explore the issue of divinity of Shariʿah. According to the Merriam-Webster Dictionary, the word "divine" means: "of, relating to, or proceeding directly from God."[37] Is the Shariʿah something that has come directly from God? Any answer to this depends on how the scope of the "Shariʿah" is defined. For example, if the Shariʿah is equivalent to Islamic law (fiqh) then it cannot be considered divine. This is indisputable: fiqh or Islamic law is, after all, mostly a human construct. Even though one of the *usul* (source methodologies), the Qur'an, is regarded by Muslims as divine, the other sources – Hadith, Ijmaʿ (consensus) and *Qiyas* (analogical deductions) – are not, generally speaking, sacred.

To fully appreciate the relevance of the preceding, it is important to understand some of the essential aspects of each of the three non-Qur'anic sources. In the case of Ijmaʿ, even where it is achieved it is a human construct. Moreover, there is hardly anything on which there exists an Ijmaʿ, including the definition of the word. Many scholars acknowledge there is no Ijmaʿ on most matters about which an Ijmaʿ is claimed. According to Imam Ibn Taymiyyah (d. 1328 CE) "... *many problems about which people think that there is Ijma on them, while in fact there is none. Rather in some cases even the opposite view is correct and is upheld.*"[38]

Neither is Ijmaʿ a source from which to derive laws. Rather, it is used to validate already derived or formulated law. Some scholars have elevated the status of Ijmaʿ above the Hadith. Others have elevated Ijmaʿ above all other sources, including the Qur'an. However, there

are eminent Islamic jurists, such as al-Amidi (a leading scholar of *Usul al-Fiqh*), who have acknowledged the "probabilistic" basis of Ijmaᶜ:

> Amidi seems, when all is said and done, to belong to the camp of those who saw the Ijma as functioning as a **probable** indicator of the law, one that could yield nothing more than opinion. True, he seems, on the issue of the authority of the Ijma, to try to straddle the fence between the two camps by affirming the *near* conclusiveness of the supporting Qur'anic and Sunnaic texts, especially the latter. But near conclusiveness is not, from a technical point of view the same thing as conclusiveness, and Amidi finds himself constrained in the end to let the absolute authority of the Ijma rest upon probability. This being the case, he has no choice but to regard *the* Ijma *as actually operating as a probable indicator dependent upon the fallible deliberations of the individual mujtahid*.[39]

The issue of Ijmaᶜ is the subject of Chapter Four, where it is dealt with in more detail.

For much of Islamic law, *Qiyas* has been the source most commonly used. It is acknowledged, even by Islamic jurists and scholars, that *Qiyas* is essentially a form of human reasoning. Analogical reasoning, *Qiyas*, is applied in conjunction with something available in the two primary sources: the Qur'an and the Sunnah. Regardless, it remains an essentially human construct at the end of the day. Thus, most of the output of *Qiyas* cannot be regarded as divine. Further details concerning *Qiyas* are dealt with in Chapter Five.

Even though the Hadith is regarded as one of the two primary sources, discussing its essence is an acutely sensitive issue. However, Muslims are conscientiously duty-bound to approach all matters of such importance in an objective manner in light of the guidance of the Qur'an and the Sunnah. While the Qur'an is considered divine, since it is believed to be the direct, verbatim and unadulterated, final revelation from God the Hadith, as a body, does not occupy the same level. This requires greater explication.

Although *Sahih al-Bukhari* is considered the most highly regarded collection of Prophetic narrations (deservingly so), the compiler did not specify what criteria were used to evaluate and select a narration for the collection. In his compilation, al-Bukhari has made specific

conditions to accept prophetic hadith from narrators.[40] Indeed, the compilers of the six major collections (*al-sihah al-sittah*)[41] have not specified or disclosed their criteria in general. Other scholars later attempted to identify the criteria employed:[42]

> Most of the authors of the six principal books of Hadith did not describe their criteria in selecting the material, except for a sentence here and there, but it is possible to arrive at some conclusions from their writings. Hazimi and Maqdisi studied the subject. They studied the qualities of narrators whose ahadith have been recorded in those books and tried to find out a general rule. Hazimi says that those scholars had certain criteria in accepting a narrator whose Hadith they were going to record in their books.[43]

The enterprise to collect and compile the Hadith was undertaken several centuries after the Prophet and involved hundreds of thousands of people. That the compilers did not specify the criteria employed for authentication is manifest, however, the list of criteria was also not identical among the compilers as well. Predictably, in the two most highly regarded collections – *Sahih al-Bukhari* and *Sahih Muslim* – many reports appear in one but not the other. The other compilations tell a similar story.

Moreover, different narrations are graded *sahih* (sound), *hasan* (good), *daʿif* (weak) and *maduʿ* (fabricated). Although there is broad agreement on many of the reports considered to be *sahih*, there are also many whose authenticity enjoys no such agreement. Some Hadith are regarded as *sahih* by some scholars but not by others. Generally the collections of Bukhari and Muslim are labeled *sahih* but this does not ensure that every narration contained therein is *sahih*. It is also notable that the method of authentication adopted by the compilers excluded scrutinizing the Hadith according to the *matn* (text) for its consistency with the Qur'an, other narrations, or established historical facts.

Thus, at the same time that the process of authentication as well as the pronouncement of certain scholars elevated the Hadith literature to a level of acceptability and reliability higher than warranted other scholars maintained that, unless *mutawatir* (narrated through numerous

chains), even *sahih* narrations provide knowledge that possesses some element of doubt. And, however much the Hadith literature constitutes a precious complementary source of guidance, its human input is therefore too high for it to be considered divine.

The area of Hadith authentication is a difficult one, and I would argue from the outset it is in no way meant to undermine Muslim confidence in Hadith. In fact, it is from Hadith, that the life of the Prophet Muhammad has been taken from memory and brought to life, the great forms of Islamic worship and prayer codified, and the foundations of the Sunnah laid. Moreover, Muslim scholars deserve deep appreciation not only for their painstaking work in compiling the Hadith, but also their invaluable contribution towards preserving the Hadith literature to the best of their ability. However, the process is ongoing, and needs careful and systematic reexamination.

The Qur'an covers only a few of the most important injunctions (albeit in the most general of terms). Most of the Shari^{c}ah (and the laws and codes attributed to it) then is necessarily based on the Hadith literature. The Hadith literature itself cannot be considered divine in the sense that the Qur'an is and it is therefore important to comprehend thereafter why any claim that the Shari^{c}ah covers the entire spectrum of life for which sacred and binding laws are already laid out is erroneous or worse. This position cannot be supported from an Islamic viewpoint:

> The Sharia is ... the totality of divine categorizations of human acts. But these categorizations have not, according to the common Muslim view, been precisely spelled out for the benefit of mankind. True, God has revealed His eternal speech – an attribute inhering in His very essence – to mankind through prophets. But when searches through the repositories of divine revelation, one does not find an abundance of statements of the form 'X is obligatory' (or recommended, disapproved, forbidden, etc.). Instead, one finds a variety of less precise linguistic forms on the basis of which human scholars must ascertain to the best of their ability the divine categorizations and then give precise expression to them. Statements of the form 'X is obligatory' are thus, for the most part, the result of human scholarly effort; they are not themselves given. What *is* given is a plethora of highly interpretable 'indicators' (*adilla)* of the divine categorizations.

> God in His wisdom has chosen to engage human beings in the toilsome task of ferreting out the categorizations from these indicators, of articulating what he himself has not precisely articulated. In this way he has afforded them greater opportunity for proving their devotion to him and for attaining favor with him.[44]

It what sense can the "Shariʿah" be considered divine? Well, in the first place it could be if it is understood as entailing the Divine Will; in the words of one of the leading Muslim scholars of our time "eternal unchanging law *as it exists in the mind* [meaning intention] *of God*."[45] In this case, it can and must be regarded as "eternal," "immutable," "divine," and "infallible." However, it must always be borne in mind that we cannot read the intention of God. God is Eternal, Infallible, and the laws in His intention are immutable as well. This is not the case as far as humans are concerned. Even regarding the Qur'an – the divine, immutable Book of final revelation – our human understanding and interpretation of the text falls short of being divine or infallible.

The traditionalist tendency has rarely acknowledged its own sense of fallibility even if it has admitted to this characteristic of God's nature:

> The main drawback of the traditional approach is that since it begins with the pious assumption of its own infallibility, it is totally intolerant of all parties, approaches, and circumstances that do not agree with it. An approach that demands even its detractors' cooperation is clearly impractical. Rather, it is symptomatic of the Ummah's problem itself. Essentially, the approach that has dominated the Ummah's thought for so long is little more than a stubborn insistence on maintaining the facade of Islam's golden age. The traditional approach ignores the realities of history and material development. Therefore it has consistently failed, despite the Ummah's faith in Islam.[46]

Muslim scholars and jurists seldom offer their thoughts and rulings with disclaimers. Muhammad Taqi Usmani, a renowned and much sought after expert in the field of Islamic finance, is no exception. However, there is admission in his writing that human input is indeed fallible:

> ... it needs to be realized that whereas the laws ordained by Allah and His Prophet are sacred and there is no room for doubts about it, when these laws are codified, that code of law represents human effort, which is not infallible, but susceptible to mistake. The drafting of any law is a very delicate undertaking. All possible situations have to be kept in mind and provided for in words. Since human intelligence, being limited, cannot visualize all kinds of circumstances in advance, there is always the possibility of flaws and weaknesses in any piece of law. The *Hudud* Ordinances are no exception. They may suffer from weak drafting. They may contain some aspects that are in need of review and improvement.[47]

Nevertheless, the Qur'an *is* immutable which implies that no verse is to be discarded or eliminated whatsoever.[48] Thus, any specific and explicit injunction of the Qur'an – in the general sense – remains forever applicable.

For example, fasting is obligatory on all able-bodied adult Muslims. Yet, there are only a few verses concerned with the obligation containing little of the detail that is to be garnered from consulting the Sunnah, as reflected in the Hadith. The deeper the level of investigation into the issue, the greater the occurrence of a great many divergent, and sometimes even downright contradictory, narrations on the basis of which, using Ijmaᶜ or *Qiyas* (whatever is deemed relevant), the scholars have constructed the specifics of the rules involved. Thus, disagreement of this nature among the various *madhahib* (schools of fiqh) is the outcome of human endeavor in the process of extracting and formulating rules and laws. In this example, the divine commandment about fasting (*sawm*) being a *fard* (obligatory) is immutable. There can be no serious contention that the practice is not obligatory on able-bodied Muslims. All other details about which the Qur'an or *mutawatir* Hadiths are not manifestly clear on can only ever result in some degree of doubt. This does not mean, however, that the lack of certainty arising from the detail involved renders it useless – far from it. But to claim that the Shariᶜah (what the users of the notion actually mean is Islamic law) is "divine" while most of it is human construct, is demonstrably false.

The bottom line is that in the sense that the Shariᶜah is commonly used – the scope and equivalence of laws covering the *entire* spectrum

of life, where the details of the laws are not derived from a divine origin, but instead from less divine (Hadith)[49] and human derived (Ijmaʿ and *Qiyas*) sources – it is ***not*** divine.

There are other serious negative ramifications that result from the treatment of the Shariʿah as divine in a comprehensively legalistic sense. Based on the works of al-Amidi, a noted classical scholar, ijtihad, which constitutes the basis for the detail behind most Islamic law, yields uncertain knowledge (further explained in detail in Chapter Three). Ibn Khaldun (regarded by many as the father and founder of Sociology) acknowledged that his work was inspired, in general, by Islam, although based on an inductive method. This indicates that, at a certain level, seeking knowledge and understanding cannot simply be limited to investigating sacred texts and using deduction as a methodology. Another noted Islamic scholar, al-Shatibi (d. 1388 CE) applied the inductive method to develop a better understanding of the Shariʿah from the perspective of its underlying purpose or objective (*maqasid*). Unfortunately, text-oriented deductions from sacred texts gradually led to reductionist legalism. This aspect is dealt with in detail in Chapter Six.

IS THE SHARIʿAH IMMUTABLE?

A definition for the term "Shariʿah" is required to answer this question adequately. If the Shariʿah is employed in the common sense it is normally used and promoted by various Islamic movements, together with certain countries that have attempted (or are attempting) to "implement" models of it, then it is not immutable. However, the traditional claim to the contrary is quite categorical. Claiming that modern Muslim jurists equate the Shariʿah to the Qur'an and Sunnah (Hadith) only, one scholar has asserted:

> There are a number of verses of the Holy Qur'an and *Ahadith* of the Holy Prophet to prove the fact that both the above mentioned sources of Islam are universal, eternal, perfect and immutable. … The Holy Qur'an and the Sunnah of the Holy Prophet provide universal, eternal and immutable Divine guidance for all countries in the world. They transcend geographical boundaries and religious, racial and regional prejudices.[50]

On the contrary, according to Mawdudi, one of the leading twentieth century Islamic personalities, the Deen (Islam in the generic sense of submission to the Creator God) is immutable as it has been constant throughout human history. However, the Shari^{c}ah is not immutable because there have been variations to it under the guidance of different messengers, such as Moses, Jesus and Muhammad:

> The meaning of Shariah is mode and path. When you have acknowledged God as your sovereign and accepted His servitude and have also admitted that the Messenger is the tangible ruler holding authority on His behalf and that the Book has been sent by Him, it will mean you have entered Deen. ... After this, the mode in which you have to serve God and the path you have to traverse in order to obey Him, is called Shariah. This mode and path has been indicated by God through His Messenger who alone teaches the method of worshipping the Master and the way to become pure and clean. The Messenger shows us the path of righteousness and piety, the manner in which rights are discharged, the method of carrying on transactions and dealings with fellow-beings and the mode of leading one's life. *But the difference is this that while Deen always was, has been, and is still one and the same, numerous Shariahs came, many were cancelled, several were changed but these alterations did not change the Deen*. The Deen of Noah was the same as that of Abraham, Moses, Jesus, Shuaib, Saleh, Hud and Muhammad (peace be on them) but the Shariahs of these Prophets varied from each other to some extent. The modes of saying prayer and observing fast were of one kind with one prophet and of another kind with the other. Injunctions about Halal and Haram, rules of cleanliness and codes of marriage, divorce and inheritance somewhat differed from one Shariah to another. In spite of this, all were Muslims – the followers of Noah, the followers of Abraham, the followers of Jesus and those of Moses, and we too are all Muslims because Deen is one and the same for all. This shows that Deen is unaffected by differences is the rules of Shariah. Deen remains one though modes of following it differ.[51]

The above view is consistent with the Qur'an:

> The same religion [Deen] has He established for you as that which He enjoined on Noah – the which We have sent by inspiration to thee – and that which We enjoined on Abraham, Moses, and Jesus: Namely, that

> you should remain steadfast in religion, and make no divisions therein: to those who worship other things than Allah, hard is the (way) to which you call them. Allah chooses to Himself those whom He pleases, and guides to Himself those who turn (to Him). (*Surah al-Shura*, 42:13)

Thus, in the face of assertions which maintain that the Shariʿah is immutable or eternal, these are but vacuous, emotional, unscrupulous and indefensible claims. This understanding is reflected in the historical development of the Shariʿah as a rigid body of theological dogmas and legal codes:

> By the tenth century, the basic development of Islamic law was completed. The general consensus (*Ijma*) of Muslim jurists was that Islamic law (Islam's way of life) had been satisfactorily and comprehensively delineated in its essential principles, and preserved in the regulations of the law books or legal manuals produced by the law schools. This attitude led many to conclude that individual, independent interpretation (*ijtihad*) of the law was no longer necessary or desirable. Instead, Muslims were simply to follow or imitate *(taqlid)* the past, God's law as elaborated by the early jurists. Jurists were no longer to seek new solutions or produce new regulations and law books but instead study the established legal manuals and write their commentaries. *Islamic law, the product of an essentially dynamic and creative process, now tended to become fixed and institutionalized.* While individual scholars like Ibn Taymiyyah (d. 1328) and Al-Suyuti (d. 1505) demurred, *the majority position resulted in traditional belief prohibiting substantive legal development*. This is commonly referred to as the closing of the gate or door of *ijtihad*. *Belief that the work of the law schools had definitively resulted in the transformation of the Sharia into a legal blueprint for society reinforced the sacrosanct nature of the tradition;* change or innovation came to be viewed as an unwarranted deviation *(bida)* from established sacred norms. To be accused of innovation – deviation from the law and practice of the community – was equivalent to the charge of heresy in Christianity.[52]

While many traditionalists have elevated the Shariʿah to a sacrosanct level and effectively consider it immutable, many Islamic jurists have conversely recognized that a vast portion of it is changeable, subject to circumstances and situations as per the principle: "Rulings

change according to time and place."[53] Some jurists and scholars, paralleling the attendant regime of *taqlid*, have honored the legacy of ijtihad as part of their pursuit to maintain contemporary laws and codes. Those Islamic jurists of the present era, who are aware of modern challenges, have been diligent in bridging the gap between legal theory and reality, thereby effectively rejecting the imputation of immutability. The dynamism of Islamic law was its hallmark even during the times of the Prophet's Companions. Thus, at the level of detail concerning its application, the Sunnah is precisely the opposite of immutable. Ibn Qayyim al-Jawziyyah (d. 1356 CE) shares an illuminating perspective on this facet:

> Omar ibn Al-Khattab judged [in a case in which] a woman died and left her husband, her mother, two full brothers and two half brothers from her father, and decided to distribute the third of her inheritance between all the full as well as half brothers. A man said to him [i.e., to Omar] 'you did not do the same in the year so and so.' Omar replied: 'that [decision] was according to what we had judged then and this [decision] is according to what we are judging today.'[54]

Thus, it is erroneous to view laws derived from Islam as fixed or forever unchanging:

> [I]t was not the mission of the Prophet to build up a structure of conduct and action that was rigidly fixed for all time irrespective of the change of circumstances. On the other hand, the Prophet gave to his Companions general lines of guidance which would enable them to build a fresh structure of action and conduct under changed circumstances. This kind of flexibility can be seen in the behaviour of the Prophet's Companions. They did one thing in Egypt, another in Syria, and still another in Iraq.[55]

IS THE SHARIʿAH THE SAME AS ISLAM AND IS IT A COMPLETE CODE OF LIFE?

From the preceding discussion it should be clear that the Shariʿah is not the same as Islam. Interestingly, the comment "Shariʿah is just another

name of Islam," was made by Khurshid Ahmad, (see endnote 25), one of Mawdudi's protégés. The latter held a quite different view of the matter. Accordingly, the Deen (meaning Islam) has been constant for all people, unlike the Shariʿah.

Does the Shariʿah constitute a "complete code of life?" Once again, it is important to determine what it is that this statement means in the first place. The following corresponds to the traditional commentary on the matter:

> Islam establishes a clear system of worship, civil rights, laws of marriage and divorce, laws of inheritance, code of behavior, what not to drink, what to wear, and what not to wear, how to worship God, how to govern, the laws of war and peace, when to go to war, when to make peace, the law of economics, and the laws of buying and selling. *Islam is a complete code of life.*[56]

> There are two major reasons as to why Islam becomes an easy target for the western media when compared to other religions. The first reason is that Islam provides a complete code of life and it is for this reason that *every action of a Muslim is attributed to his religion.*[57]

> During the seventies, [the] Islamic Development Bank (IDB) and a number of Islamic banks at national levels were established in the Islamic world. At home, the Islamic groups were vigorously working for adoption of *Islam as the complete code of life.*[58]

> *Islam is a complete code of life* and its implications are expanded to all walks of life. It is a belief, a tradition, acts of worship, as well as a code of socio-economic and political activities to ensure peace and socio-economic justice for the Muslims and non-Muslims alike.[59]

> The distinguishing factors in the Muslim context are (a) the frequent resort to religion as self-evidently valid premises for (usually discriminatory) laws, and (b) the symbiotic relationship the religion of Islam has developed with Muslim jurisprudence. This relationship is exemplified by the common and frequent assertion by Muslims that "Islam is a complete code of life" to suggest that all legal matters have already been determined by religion. Clearly neither the basic text of Islam, the *Qur'an*,

> nor even the Hadith (practices and traditions of the Prophet) are legal codes, though prescribed in both are suggested codes of behavior. As one of the most important disciplines to emerge in Islamic scholarship, however, jurisprudence has dominated Islamic scholarship to the point that today a well known Muslim scholar, Syed Hossein Nasr, can assert 'The Shariah is the Divine Law by virtue of accepting which a person becomes a Muslim. Only he who accepts the injunctions of Shariah as binding upon him is a Muslim.'[60]

The statements above concerning Islam representing a "complete code of life" suggest that Islam has guidance for the full spectrum of life and that there is an implication of a solution for every issue, situation, or problem. Also implied is the notion that since Islam is a self-contained, self-sufficient way of life, Muslims must not turn to any other source for guidance or solutions:

> As Islamic law is a comprehensive and interrelated unit, the application of its various branches is subject to a single standard, i.e. Islamic law does not accept the application of different sets of standards to its different branches.[61]

According to Islam life *is* an integrated whole; hence the appeal of the concept of a "complete code of life" in the belief. Muslims cannot simply borrow capitalism as a means to run the economy, democracy for their politics, nationalism to galvanize society, etc. as interchangeable components in order to formulate their own cocktail ideology or system.[62] To ensure consistency and balance Islam provides the essential guidance to deal with life as an integrated whole. However, to insist that Islam is a fleshed out manual dealing with every problem or issue that Muslims may encounter would also be incorrect.

Another implication, though it is not often stated, is that all problems and issues have already been identified, with the solutions to them either specified in the textual sources or worked out by the scholars. From this perspective, there is no need or any relevance to learn anything from others. All social, economic, educational, and political problems, or whatever problem (except those that are scientific, technological, or engineering in scope) that can be conceived of, need only

to be referred to the primary Islamic texts (the Qur'an and Hadith), or the books of the scholars, or fatwa councils or the appropriate hotline, and the solution would be there.

The reality is far from this. It stands to reason that if, indeed, all the problems and solutions were known, or easily deducible, the condition of the Muslim world would not be so miserable and deplorable. A fundamental pitfall of Muslim thought has been its over-reliance on its sacred texts, which is the subject of Chapter Six. Understanding how God originated His creation cannot be gained by burying heads in books. After all, God has commanded: "Say: 'Travel through the earth and see how Allah did originate creation; so will Allah produce a later creation; for Allah has power over all things'" (*Surah al-ʿAnkabut*, 29:20). The Creator did not order "read the sacred or the right books," but, instead, "**travel** ... and **see**." However, while the world of science moved on, leaving the Muslims far behind, the scholars, inclined towards the Shariʿah, kept their co-religionists glued to the Islamic texts. All involved would have done well to have appreciated the power and glory of God reflected in nature by exploring the universe as well as consulting their texts:

> [Hallowed be] He who has created seven heavens in full harmony with one another: no fault will you see in the creation of the Most Gracious. And *turn your vision* [upon it] once more: can you see any flaw? Yea, turn your vision [upon it] again and yet again: [and every time] thy vision will fall back upon thee, dazzled and truly defeated... (*Surah al-Mulk*, 67:3–4)

So rigidity in Islamic thought which has rendered the understanding of Shariʿah as something mechanical and which makes deductive rulings of the past binding forever is the crux of the issue, having led to sterility and stagnation in Muslim thought.

Hence the context of the problem is the prevailing static understanding of Islam, which regards textual sources together with the attendant experts and scholars as "dictionaries" to find answers from. Thus, just as words are looked up in dictionaries by opening the right page and finding the required entry, it is assumed that all the words are there to do this in the first place. In reality Islam is not like a dictionary,

rather, it is more like an alphabet. Many words are available for consultation in the dictionary and those words not already formed will be based on the alphabet. Possessing an understanding of Islam as a "complete code of life" in ways analogous to using a dictionary, it was predictable that its practice would become fossilized and stuck in the past. The converse understanding of the "complete code of life" as constituting an alphabet (essential principles or building blocks) will reform one's approach to and the outcome of dealing with the issues and challenges of life. Such an approach would then become dynamic and relevant. From this perspective the Qur'an would resume its status as a source of essential guidance from which to formulate solutions. As al-Shatibi has pointed out:

> ... experience shows that every ᶜalim who has resorted to the Qur'an in search of the solution to a problem has found in the Qur'an *a principle* that has provided him with *some* guidance on the subject.[63]

IS THE SHARIᶜAH THE SAME AS LAW ?

As noted earlier, the Shariᶜah is often confused with "law." Accordingly, no distinction is maintained between Shariᶜah and fiqh. Indeed, the equation Shariᶜah = Islamic Law underlies the widespread misperceptions that abound:

> Under the rules of Islamic Law (Sharia), companies are divided into two main classes: ...[64]

> *The term Shariah refers to Islamic law* as revealed in the Qur'an and through the example of the Prophet Muhammad (peace be upon him).[65]

> Islamic Financial Institutions (IFIs) ... claim to run all their activities in accordance with the principles of Shariah (Islamic Law).[66]

> fiqh: lit. understanding or perceptiveness; the science of the divine law, the sum of man's knowledge of the *Shari'a, Islamic law or jurisprudence*.[67]

The equation drawn between the Shariᶜah and Islamic law represents a profound confusion regarding Islam. Compounding the

confusion are those Muslims attempting to implement the Deen based on this misconception. If, as is the case, the Shariʿah relates to the entire spectrum of life, then it stands to reason that it cannot all be concerned with law. For example, ablution, prayer, fasting, etc. are not legal matters at all. Turning every aspect of Islamic guidance into law is therefore inconsistent with Islam:

> Generally, when scholars in the field of Islamic studies speak of 'Islamic law,' it is presumed that they are talking about what is called in Arabic *al-shari'a*, or *al-shar'a*. Indeed, they frequently speak simply of 'the *Shari'a*,' or use the terms 'Islamic law' and 'the Shari'a' interchangeably. However, it is something of an oversimplification to equate *Shari'ah* with law. The Shari'a may indeed be said to *contain* law, but one must also recognize that it embraces elements and aspects that are not, strictly speaking, law.[68]

Indeed, Islam is much broader; that the Shariʿah is more than simply law is clear from the Qur'an itself:

> Thus we put you on the (right) Way of Religion [i.e. ***sharia**tim min al-amr*]: so follow that (Way), and follow not the desires of those who know not. (*Surah al-Jathiyah*, 45:18)

Importantly, this is the only point at which the word Shariʿah itself is used in the Qur'an and in this case it has been employed in a generic sense; its meaning being much wider in scope than simply law. Moreover, this verse hails from the Makkan period when laws, codes, and obligatory rituals generally did not exist. Abdullah Yusuf Ali clarifies:

> Shariah is best translated the 'right Way of Religion,' which is wider than the mere formal rites and legal provisions, which mostly came in the Medina period, long after this Meccan verse had been revealed.[69]

The clarification of ʿUmar ibn ʿAbd al-ʿAziz (also known as ʿUmar the Second; d. 720 CE) in a letter to Adi bin Adi is illuminating because he distinguished the *shara'iʿ* from the *fara'id*, *hudud* and Sunnah. Thus the *Khalifah* did not classify all these aspects under the sole label of Shariʿah:

> Umar bin Abdul Aziz wrote to Adi bin Adi, 'Belief includes *faraid* (enjoined duties), *shara'ii* (laws), hudood and sunna. And whoever follows all of them has complete belief and whoever does not follow them completely, his belief is incomplete.'[70]

It is interesting that the standard work of translation dealing with *Sahih al-Bukhari* presents the term *shara'iᶜ* as "laws," however, this renders ᶜUmar ibn ᶜAbd al-ᶜAziz's statement incoherent since he clearly distinguishes the *fara'id* and *hudud* from the *shara'iᶜ* in it. This also serves as an illustration of how biases and distortions from later generations have been projected back to earlier thinking and sources. Similarly, Imam Shatibi did not equate the Shariᶜah to Islamic law:

> Imam Shatiby, a Maliki jurist, in his *magnum opus, al-Muwafaqat fi Usul al-Shariah*, elaborates about the general framework of Sharia. He contends that within Sharia there are variants that should be understood comprehensively among others: law, ultimate goal of Sharia, textual justification (*dalil)*, and ijtihad. *It means that sharia should not be understood just as a law.* ...[71]

Indeed, as Lily Zakiyah Munir, a leading Indonesian Muslim human rights activist and Islamic scholar, explains, the Qur'an itself does not constitute a manual of law:

> The Qur'an calls itself *al-huda*, or guidance, not a code of law. Out of over 6200 ayat, less than one tenth relate to law and jurisprudence, while the remainder [are] concerned with matters of belief and morality, the five pillars of the faith and a variety of other themes. Its ideas of economic and social justice, including its legal contents, are on the whole subsidiary to its religious call. There are close to 350 legal *ayat* in the Qur'an, most of which were revealed in response to problems that were actually encountered. Some were revealed with the aim of repealing objectionable customs such as infanticide, usury, gambling and unlimited polygamy. Others laid down penalties with which to enforce the reforms that the Qur'an had introduced. But on the whole, the Qur'an confirmed and upheld the existing customs and institutions of Arab society and only introduced changes that were deemed necessary.[72]

Despite the fact that the verses dealing with legal matters constitute a rather small portion of the whole, legalistic tendencies still manage to reduce the Qur'an to a series of laws only:

> It is not surprising that *fiqh* is often viewed as representation of the religion itself. The role of *fiqh*, therefore, changes up and down in line with the inclining and declining role of the religion in the state. In countries imposing formal sharia, *fiqh* has a big authority in regulating human life as individuals, as part of the society, and in their relation with God. On the contrary, in a secular country *fiqh* is internalized more as regulating human relations with God.
>
> *Fiqh is often mixed up and confused with sharia.* The latter is comprehensive, the Way ordained by God, embracing all from moral and ethical values, theology, spiritual aspiration, to formal ritual worships. ... it is clear that *fiqh* is actually a *part* of *sharia*.[73]

Anyone believing that God is Most Merciful and Most Gracious and that He has sent guidance to mankind desires that they receive the maximum benefit from that counsel. Converting everything into a matter of law, however, adds an undue burden of rigidity to life inconsistent with man's *fitrah* (innate human nature). The Qur'an urges believers to focus on avoiding the big sins (*kaba'ir*). This does not mean that His adherents should treat other sins lightly, but neither should everything be considered a simple matter of law:

> If you (but) eschew the most heinous of the things [*kabair*] which you are forbidden to do, We shall expel out of you all the evil in you, and admit you to a Gate of great honor. (*Surah al-Nisa'*, 4:31)
>
> Narrated Abu Hurairah: The Prophet (p), "Leave me as I leave you, for the people who were before you were ruined because of their questions and their differences over their prophets. So, if I forbid you to do something, then keep away from it. And if I order you to do something, then do of it *as much as you can*."[74]

Do these injunctions give the impression that everything in life is strictly a matter of law? Is the literalist notion of law compatible with

striving as far as individually possible? The following tradition further clarifies the matter:

> Narrated Abu Huraira: The Prophet said, "Religion is very easy and whoever overburdens himself in his religion will not be able to continue in that way. So you should not be extremists, but try to be near to perfection and receive the good tidings that you will be rewarded; and gain strength by worshipping in the mornings, the nights."[75]

Moreover, the Qur'an exhorts that the lesson of the Children of Israel, after they perverted God's guidance, be learnt:

> The Jewish nation was in the grip of legalism and ritualism. Their superabundant ordinances, in the words of the Qur'an, had become halters and shackles hindering a healthy development of moral as well as physical life.[76]

Indeed, reducing Islam or the Shari^{c}ah to the status of fiqh or Islamic law has serious ramifications, many of which have been observed in those countries attempting to "implement" the Shari^{c}ah within narrow, legalistic limits:

> *The comprehensive sharia is often narrowly understood, just as fiqh*. Demands for formal sharia in several regions in Indonesia, for example, in reality is no more than the application of *fiqh*. When formal sharia has been agreed upon, the first action taken is to impose the obligation to wear head scarf *(jilbab)* for women, flogging, or hand chopping, and other rules that can be explicitly found in the texts. *More significant problems detrimental to the lives of the majority like corruption, women trafficking, or business monopolies are not viewed as part of sharia just because these issues are not found in the texts*.
>
> This misconception has a significant effect to the way Muslims internalize the religion. *When Islam is represented as sharia and sharia is understood just as formal rules, consequently, Islam is internalized just as a formal dogma*. Physical dimension of the religion is prioritized over its spirituality. Pillars of Islam like prayer (*salat)*, fasting *(saum)*, alms *(zakat)*, or *haj* are also reduced to mean just as ritual worships. During the Prophet's life these teachings had the power as a social movement with effect for social transformation. The

> dominant textual approach to Islam has restricted the religion's power and scope, because texts cannot respond directly to the prevalent problems faced by Muslims such as modern sophisticated crimes and corruption.
>
> *Fiqh or shariah understood just as fiqh is not the whole of Islam itself.*[77]

One source of confusion – added, unfortunately, by Muslims themselves – is the failure to recognize that regarding the comprehensiveness of life and Islamic teaching, its implementation is not merely according to an external authority. Much of what is applied in terms of the Shariʿah occurs at the personal level:

> In Europe and in North America, as soon as one pronounces the *shahada*, as soon as one 'is Muslim' and tries to remain so by practicing the daily prayers, giving alms, and fasting, for example, or even simply by trying to respect Muslim ethics, one is already in the process of applying the *Sharia,* not in any peripheral way but in its most essential aspects.
>
> This practice and moral awareness are the source and heart of the Sharia, which is personal, faithful commitment. Beyond that, the Way itself exerts its own influence more comprehensively, with regard to the guidance of existence, even if not in the same way, and we must mention this essential factor here, with respect to the methodologies, norms and details of application of various regulations. This characteristic of Islam is contained within the concept of *shumuliyat* al Islam, 'the comprehensive character of Islamic teaching.'[78]

IS THE SHARIʿAH ENFORCEABLE (OVER ITS ENTIRE SPECTRUM) ?

Implementation of the Shariʿah is usually discussed within the context of enforceable laws. Indeed, the most immediate manifestation of such implementation tends to be "enforcement" of the penal codes known as the *hudud* – specific punishments prescribed for certain offenses in the Qur'an (murder, adultery, theft, etc.). As already argued, equating the Shariʿah to Islamic Law is simply erroneous because Islam, in the comprehensiveness of its guidance, not only covers law but also values,

principles, rituals, etc. Therefore it is clear that not all aspects of Islam are enforceable by human authority.

According to Khurram Murad: "Laws are therefore an important and integral part of the Shari'ah and, as we have already noted, it admits of no distinction between its parts: *'to pray is as valid, enforceable, obligatory and sacred* as 'to consult in collective affairs' or to 'prohibit interest' ...'" In my opinion this is a mistaken interpretation and the problem lies in the word "enforceable". It is true that Muslims are expected to live as part of a society where there would be laws based on the Qur'an and Sunnah, but life is definitely more than the exercise of legal precepts alone. In this respect Usmani's remarks are pertinent:

> Besides providing legal means for discipline, Islam also provides non-legal teachings for the reform of society, which greatly help in curbing crimes. This implies that an Islamic state cannot absolve itself of its duties by just enforcing the *hudud*; it is also responsible for creating an atmosphere that discourages the incidence of crime in the first place.[79]

Of course, the creation of the right atmosphere does not involve enforcement by itself. If the *hudud* deals with transgressions, what about the converse, the regulation of duties and obligations? Murad has his own view on the sanction of a Muslim who refuses to pray based on the opinions of those Islamic jurists who have made its neglect unlawful (and punishable):

> In an Islamic state, Taarik as-Salaat [one who intentionally avoids saying the five daily prayers] will be asked to explain why is he doing it? If he persists in his habit of not praying then Imam Malik and Shafi'i say that he should be killed. Imam Abu Hanifa says that he should be warned of dire consequences first, then imprisoned if he continues not to pray until he makes Taubah or dies in the prison.[80]

Because salah is one of the fundamentals of Islam, abandoning the practice is a serious matter. Indeed, to be Muslim (by choice and affirmation – as per the *shahadah*) and not pray makes little sense. No other ritual has been emphasized in the Qur'an as much as salah. Additionally, the Prophetic narrations are similarly emphatic.

Nevertheless, the punishment (ranging from imprisonment to execution) needs to be established from the Islamic sources. The evidence for this, however, is specious due to the scholars' weak interpretive conclusions. Of course, neither Uthaymeen, the author, nor the authorities he cited address the value and relevance of a prayer made under duress. Would salah offered under these conditions be intended to please Allah or fellow human beings? If intended for Allah, would the Creator really value the prayer of someone compelled to do so by society? This is akin to playing God. Moreover, Uthaymeen concludes that abandoning salah is *kufr*, but abandoning zakah (alms-giving) is not; accordingly, the punishment for either abandonment ought to be different. If this is indeed the case, then refusing to pay zakah should be considered the more serious offense because it affects society, whereas salah is a matter between an individual and God. Zakah involves the right of other human beings to a share in one's wealth.

Evidence from the Qur'an that justifies or sanctions the punishment of those who refuse to pray is required. Alongside this evidence is the necessity to address the issue of whether it makes sense to force someone to pray and whether God would accept an act of worship from those so compelled in any case:

> If it had been your Lord's will, they would all have believed – all who are on earth! Will you then compel mankind, against their will, to believe! (*Surah Yunus*, 10:99)

> Let there be no compulsion in religion: Truth stands out clear from Error: whoever rejects evil and believes in Allah has grasped the Most Trustworthy. (*Surah al-Baqarah*, 2:256)

It appears that God is not interested in enforcing prayer and fasting or in turning society into a police state to ensure the conducting of these practices after all. This is what the preceding two verses, which disavow any compulsion in religion, add up to. Indeed, in other places, the Qur'an is still more categorical in its insistence that far from being an enforcer the Prophet is not even meant to be a watcher:

> [O Prophet!] You are not one to manage (men's) affairs. (*Surah al-Ghashiyah*, 88:22)

> Your duty is to convey the Message; ... (*Surah Al ʿImran*, 3:20)

> Obey Allah, and obey the Messenger, and beware (of evil): if you turn back, know that it is Our Messenger's duty to proclaim (the message) in the clearest manner. (*Surah al-Ma'idah*, 5:92)

> Your duty is to make (the Message) reach them: it is our part to call them to account. (*Surah al-Raʿad*, 13:40)

> The worshippers of false gods say: "If Allah had so willed, we should not have worshipped aught but Him – neither we nor our fathers – nor should we have prescribed prohibitions other than His." So did those who went before them. But what is the mission of apostles but to preach the Clear Message? (*Surah al-Nahl*, 16:35)

> Obey Allah, and obey the Messenger. But if you turn away, he is only responsible for the duty placed on him and you for that placed on you. If you obey him, you shall be following the right guidance. The Messenger's duty is only to preach the clear (Message). (*Surah al-Nur*, 24:54)

> If then they run away, We have not sent you as a guard over them. Your duty is but to convey (the Message). (*Surah al-Shura*, 42: 48)

There are still more verses which repeatedly remind the Prophet of his function to convey and deliver the message.[81] One can but ponder hard the reasons why God has reiterated this particular matter so often. Is the lesson from these verses unclear or ambiguous? If the Prophet's mission was no more than conveying the message, if indeed he is not the manager (*musaytir*) of man's affairs, then is the duty of his followers any larger in scope?

The view that supports the enforcement of ritualistic observances is without merit and lacks any support from the Prophet's own behavior. The mentality of compulsion and its particular rulings represent the repudiation of his example and deserves to be firmly rejected by the

Muslims. It is possible that certain interpretations might discern the implication that Islam is left with nothing to enforce, that Muslims are not to be held accountable for anything they do in this world, either individually or collectively, and that there can be no authority which exercises any degree of regulatory or supervisory role over them. Few things could be further from the truth. As per any normal, functioning civilization, Muslim society has laws and laws are meaningless if they are not enforceable and enforced. However, enforcement of the law relates only to mutual rights in this world. For example, zakah (alms) is not just one of the ritualistic elements of worship, it is also related to, for example, the right of the poor over those on whom zakah is due. Any society respectful of Islam would enforce the obligation to pay zakah.

This is precisely the justification for the stern position occupied by the first *Khalifah* (Caliph) Abu Bakr against those who refused to pay what was due after the Prophet's death. Similarly, murder, assault, adultery, gambling, the recreational use of alcohol, etc are among the many topics with social implications for which there are enforceable laws too. Still, matters of a personal nature, including the ritual worship of God, are outside the scope of societal compulsion and are not the ambit of any Islamic penal code. If this were not so then the Qur'anic verses clearly describing the mission of the Prophet would stand contradicted and Islam would be turned on its head. Nevertheless it is an unfortunate reality that this tendency and misunderstanding remains widespread, often confirmed by the works of contemporary jurists or juristic bodies and one of the leading body of Islamic jurists.

Many problems with the implementation of the Shariʿah stem from the mentality of compulsion that bypasses all reasonable notions of enforceability. When a society is turned into a police state and the public authorities become coercive in the implementation of laws that are not within the naturally acceptable domain, such societies cannot endure. The approach of the various moral police where Shariʿah Law is practised by governments is highly illustrative; they make their people's lives miserable acting as moral persecutors rather than guardians of society.

DOES THE SHARIʿAH PROVIDE CLEAR AND UNAMBIGUOUS GUIDANCE OVER THE ENTIRE SPECTRUM OF LIFE?

An affirmative answer to the question of whether the Shariʿah provides unambiguous guidance would be comforting but, unfortunately, this is not the case. One reason why some believers are eager to "implement" the Shariʿah is their belief that definitive, authoritative and effective solutions to all the problems of life are already available in Islam as if it comprises a prescriptive set of solutions. According to the traditional view, Islamic law is "definite."[82] This is a simplistic view not consonant with reality.

The Qur'an provides examples of wisdom, exhortation, reflections about the past, as well as instructions – orders and prohibitions – involving key areas of human activity. In matters concerning injunctions the Qur'an is explicit and categorical. However, implementation of its ordinances is not straightforward, unless one adopts a straightjacket approach that often yields outcomes contrary to the intent (*maqasid*) of Islam.

Consider the following examples. The Hudood Laws in Pakistan, promulgated under a military dictator, have served to imprison – and incarcerate – many female victims of rape. Though miserable victims of a vile crime, thousands of women have been imprisoned or prosecuted for their part in it under this version of the Shariʿah.[83] Another common occurrence in many Muslim societies is the unilateral, arbitrary, unregulated divorce of a wife by her husband through the instant pronouncement of the triple-*talaq*, often leading, in turn, to the female spouse being forced out of her house and home. Conversely, the process of divorce prescribed by the Qur'an is wise, balanced and sensitive to factors involving both spouses. However, gross versions of the Shariʿah (confused with Islamic law) have validated unIslamic practices in the conductance of divorce. These practices are contrary to the Qur'an and have earned no sanction from the Prophet. Nevertheless, most schools of Islamic thought have validated them.

Witnesses are a fundamental requirement in Islam concerning many situations. However, there are broad disagreements about the necessary qualifications and context required of the witness.

Riba (usually equated with the term interest) is categorically prohibited in the Qur'an. However, consideration of the six commodities mentioned in the traditions demonstrates the amazing divergence and irreconcilable juristic opinion in these matters.[84]

More basic still, is the matter of determining the beginning or end of Ramadan. Though fourteen centuries have elapsed, what agreement has been reached on the number of units required for the *Tarawih* prayer in the same month? Even within one school of thought many differences of opinion exist. *Hidayah*, one of the most authoritative texts of Hanafi jurisprudence, demonstrates the magnitude of difference among the three most significant jurists, and originators, of the same school.[85]

These simple examples demonstrate that there has been and is a continuing need for ijtihad because *all* the answers and solutions to *all* the questions and problems are not already identified or worked out, never mind in a clear and unambiguous fashion. In Islamic jurisprudence (*Usul al-Fiqh*) it is acknowledged that, even though ijtihad is an effort based on divine guidance and other secondary sources, the knowledge derived is ***probabilistic***. The works of two well known scholars, Abu al-Husayn ʿAli, otherwise known as al-Amidi, and Mohammad ibn ʿAli al-Shawkani (d. 1255 AH), serve to reinforce this situation. Al-Amidi was one of the great scholars from among the *mutakallimun*[86] and his book is based on four earlier major works of *Usul al-Fiqh*: *al-ʿAhd, al-Muʿtamad*, *al-Burhan* and *al-Mustasfa*. Al-Shawkani is from a much later generation, but his work, especially *Nayl al-Awtar*, has earned great repute among the four schools of jurisprudence. According to al-Amidi and al-Shawkani, ijtihad can be understood as the overall exertion of a jurist in order to infer or deduce, with *a degree of probability*, the rules of the Shariʿah from their detailed evidence (*dalil;* pl. *adillah*) in the sources.[87]

Unfortunately, these facts and the reality contradict the tendency to produce everything in a clear cut, definitive and authoritative form. The semblance of standardization of laws, codes and positions within each *madhhab* lends itself to the strong impression that legal differences and discord is no more. It is true that crystallization of the four Sunni *madhhabs* (and separately, the Jaʿfari *madhhab* from among the Shiʿites)

has brought some stability and standardization. However, the historical context within which these *madhhabs* evolved needs to be taken into account together with the fostering of cohesion due to both an intra and inter-*madhhab* understanding which served to push the strong undercurrents of discord and disputation into the background. Here is a vivid sketch from the Abbasid period by way of illustration:

> Scholars like al-Awzaʿi, Abu Yusuf, Shaybani and Shafiʿi have left the details of the legal differences of the period, but the best description, which is very brief but comprehensive, in this regard, has come down to us by an 'Abbasid official dignitary, the Secretary of the State, Ibn al-Muqaffaʿ. He says:
>
> "Among the issues which Amir al-Mu'minin should take into consideration is the matter of these two cities (Kufah and Basrah) and of the other provinces and regions, concerning these contradicting legal problems, the conflict of which has become a great issue in connection with the blood, marital relations and properties of the Muslims. The blood and the marital relations which are permitted in Hirah are prohibited in Kufah. The same kind of legal conflict is taking place in the middle of Kufah. A thing is being permitted in one locality but it is being prohibited in the other. In addition to this, diverse judgments are being given regarding the blood of the Muslims and their honour. These decisions are given by the Judges and are enforced (by the Government). In the face of all this, there is not a single group from the people of Iraq and of Hijaz which perceives this situation; rather they take pride in what they adhere to and pour scorn at what the others possess. This attitude of theirs has thrown them into a situation which perturbs any one who hears it from the intellectuals."[88]

In the present context, it is right to ask whether the discordant undercurrent has really changed. Unfortunately, anyone familiar with the common practice of *takfîr* (religious denunciation and excommunication) applied to members of one Muslim group by another, even within the same *madhhab*, would not think so.[89] Although at a certain polemical and academic level there is agreement, understanding and mutual accommodation, it is not uncommon whenever a particular group holds sway, an attempt to introduce or impose its particular

position is all too common. Yet, the way in which each individual scholar or group speaks or stakes its claims so authoritatively is indicative of the fundamental underlying problem that the laws and codes, particularly at the level of their detail, are probably as unclear and unambiguous as was the case during the time of Ibn al-Muqaffaʿ.

This is not to deny that there are efforts to bring Muslims together on a variety of different levels; for example, the Islamic Fiqh Academy of the OIC, the European Council of Fatwa and Research, or the Fiqh Council of North America. However, the insistence on authoritativeness – and on the basis of this presumed authoritativeness schemes for the good of the people in the name of God are "implemented" – is a recipe for dissent. Islam should be clear and simple, and in its values, as well as its basic injunctions and prescriptions, Islam *is* both clear and unambiguous. However, the same cannot be said of the Shariʿah when it is conceived in the sense of comprehensive Islamic laws with hair-splitting detail which is not divine, immutable or even definitive.

Since the corpus of Islamic law is based on the probabilistic nature of ijtihad it is little wonder that there is wide disagreement at the inter as well as the intra-*madhhab* level.[90] Thus, it is up to the reader to decide whether any sweeping, unqualified or immodest claim – that in all its comprehensiveness, the Shariʿah offers "clear and unambiguous" guidance – is Islamically defensible.

(IV) LEGALISM AND ITS IMPLICATIONS

Religions are generally vulnerable to the charge of legalism; other beliefs besides Islam have had to deal with legalistic tendencies as well:

> Religions in general and Christianity in particular have seemingly forever waged warfare with ideologies (-ism's) from without, ranging from Gnosticism to communism and beyond. More persistent threats, perhaps, come from what I call 'ism's within.' One of those is legalism.
>
> Legalism, at one time or another, in one form or another, seems to blight every major faith. One essential function of any religion is to provide a code of conduct. Legalism attempts to solve this need by specifying, in

> great detail, just what behaviors (and prohibitions) are required of the individual.[91]

Indeed, an essential aspect of Christianity, manifested in Jesus' struggle, was the legalism to which the followers of Moses fell victim. Jesus directed his sharpest criticism towards the dehumanizing legalism of the Pharisees:

> Woe to you, teachers of the law and Pharisees, you hypocrites! You give a tenth of your spices—mint, dill and cumin. But you have neglected the more important matters of the law—justice, mercy and faithfulness. You should have practiced the latter, without neglecting the former. (Matthew 23:23)[92]

Jesus' denunciation of the Pharisees was not directed against the law in general, but against legalism. Unfortunately, Christianity modulated itself toward the other extreme by freeing itself from any legal "burden" whatsoever even though Jesus himself affirmed that he came to fulfill not break the Law.[93]

Likewise, Islam does not in general shun law, because it recognizes that a society cannot function, let alone thrive, without an effective legal system. But laws should not be considered in isolation; rather, these should be rooted in the human conscience. This helps explain why Islam provides certain legal injunctions, as well as a guiding framework, for meeting the legal needs of a functioning and dynamic society. But at the same time it also categorically warns people not to lose sight of the underlying spirit and sense of purpose of their existence:

> It is not righteousness that you turn your faces towards east or west; but it is righteousness to believe in Allah and the Last Day, and the Angels, and the Book, and the Messengers; to spend of your substance, out of love for Him, for your kin, for orphans, for the needy, for the wayfarer, for those who ask, and for the ransom of slaves; to be steadfast in prayer, and practice regular charity; to fulfill the contracts which you have made; and to be firm and patient, in pain (or suffering) and adversity, and throughout all periods of panic. Such are the people of truth, the Allah-fearing. (*Surah al-Baqarah*, 2:177)

After the extremism of Judaic legalism and the Christian abandonment of the Law, the final Messenger to mankind – Muhammad – brought back the same essential message that God has revealed since the birth of humanity; with its strong emphasis on simplicity, moderation and balance:

> Thus, have We made of you an Ummat justly balanced (*ummatan wasat*), that you might be witnesses over the nations, and the Messenger a witness over yourselves; and We appointed the Qibla to which you were used, only to test those who followed the Messenger from those who would turn on their heels (From the Faith). Indeed it was (A change) momentous, except to those guided by Allah. And never would Allah Make your faith of no effect. For Allah is to all people Most surely full of kindness, Most Merciful. (*Surah al-Baqarah*, 2:143)

This became the primary merit and attraction of Islam. In terms of its values and principles, as well as of its minimal requirements, Islam was and is essentially simple and easy, something that cannot be said about the Shariʿah or the traditionalist approach. That Islam is simple and easy is readily gleaned from the message contained in the Qur'an and the practice of the Prophet:

> ... Allah intends every facility for you; He does not want to put you to difficulties. (*Surah al-Baqarah*, 2:185)

> God desires to lighten things for you, for the human being has been created weak. (*Surah al-Nisa'*, 4:28)

To ensure ease and simplicity of practice for the people remained one of the important concerns of the Prophet:

> Narrated Anas bin Malik: The Prophet said, "Facilitate things to people (concerning religious matters), and do not make it hard for them and give them good tidings and do not make them run away (from Islam)."[94]

Muslims, who were only too occupied perfecting matters, were assured by the Prophet to relax:

> Narrated 'Abdullah bin 'Amr bin Al-As: While the Prophet was delivering a sermon on the Day of Nahr (i.e., 10th Dhu al-Hijjah of slaughtering the sacrifice), a man got up saying, "I thought, O Allah's Apostle, such-and-such a thing was to be done before such-and-such a thing." Another man got up, saying, "O Allah's Apostle! As regards these three (acts of Hajj), I thought so-and-so." The Prophet said, "Do, and there is no harm," concerning all those matters on that day. And so, on that day, whatever question he was asked, he said, "*Do it, do it, and there is no harm therein*."[95]

Illustrated here is an illuminating case demonstrating the propensity, according to Prophetic practice, to implement the Shari'ah (Islamic Law) in a humane way, whenever possible:

> Narrated Abu Huraira: A man came to the Prophet and said, 'I have been ruined for I have had sexual relations with my wife in Ramadan (while I was fasting). The Prophet said (to him), 'Manumit a slave.' The man said, 'I cannot afford that.' The Prophet said, '(Then) fast for two successive months continuously.' The man said, 'I cannot do that.' The Prophet said, '(Then) feed sixty poor persons.' The man said, 'I have nothing (to feed them with).' Then a big basket full of dates was brought to the Prophet. The Prophet said, 'Where is the questioner? Go and give this in charity.' The man said, '(Shall I give this in charity) to a poorer person than l? By Allah, there is no family in between these two mountains (of Medina) who are poorer than we.' The Prophet then smiled till his premolar teeth became visible, and said, 'Then (feed) your (family with it).'[96]

The lessons from this incident are manifold; fasting is an obligation (*fard*) its breaking through the consummation of sex being one of the worst ways to violate its sanctity. Yet the transgression was merely against God and required no enforcement of the law. The Prophet's remedy was to apply *kaffarah* (expiation) for the infraction, but in a manner which was not oblivious to relevant human considerations. Of course, the matter should not be trivialized by speculating that the Prophet treated every possible transgression in a similarly lenient fashion – simply that his was a humane, sensible approach sensitive to the context.

Unfortunately, similar Prophetic sunnahs have given way to hair-splitting legalism combined with an enforcement mentality, even where enforcement is not warranted. Such legalism does not mean that the Muslim scholars and jurists were devoid of spirituality or God-consciousness. Indeed, many were deeply spiritual, with some even leaning towards ascetic forms like sufism. Yet, in the centuries since the time of the Prophet, Muslim societies tended towards legalism reducing everything down to black and white, right and wrong, permissible and impermissible, particularly so in terms of a judgmental approach. It is arguable that while the emergence of various schools of jurisprudence offered some benefits, one important consequence was the splintering of Muslim societies into many schools (*madhhabs*) and other offshoot groups (*firqah*) that sometimes engaged in *takfir* against each other,

As Muqtedar Khan argues, the breadth of Islam suffered much from this legalistic reductionism:

> The Islamic intellectual tradition – which includes Islamic legal thought (*Usul al-fiqh* and *fiqh*), theology (*kalam*), mysticism (*tasawwuf*) and philosophy (*falsafa*) – is one of the most developed and profound traditions of human knowledge. In the area of political philosophy, however, this intellectual heritage remains strikingly underdeveloped. One of the reasons for this lacuna is the 'colonial' tendency of Islamic legal thought. Many Islamic jurists simply equate Islam with Islamic law (Shariah) and privilege the study of the latter. As a result we have only episodic exploration of the idea of a polity in Islam. Hundreds of Islamic schools and universities now produce hundreds of thousands of Islamic legal scholars but hardly any produce political theorists or philosophers. With some rare exceptions, this intellectual poverty has reduced Islamic thought to the status of a medieval legal tradition.[97]

The legalistic tradition is now fully entrenched, with such a tight grip as represented by a puritanical mentality that has drained almost all the dynamism from Islam. Yahya Emerick, an American Muslim and prolific author, offers an illuminating perspective on the subject:

> When you read their books or magazines, you find everything they say about Islam is in terms of correct/incorrect. (Such and such is not correct belief, etc...) It is admirable, of course, to be interested in the truth, but in their approach there is no life, no love, no spirituality. It's all about legalism such as the legalism of the Jews at the time of Prophet 'Esa. Hence, the recently coined condition of 'Salafee Burn-out' whereby people drop out of this movement after their heart has been completely drained of all spirituality.[98]

In Pakistan the weak and powerless receive the Shari'ah punishment for petty theft, while at the same time the powerful get away with just about anything. In most Muslim-majority countries ordinary people who consume intoxicants are prosecuted for this misdeed while it is common knowledge that the rich, famous and elite regularly consume the same substances with impunity.[99] The charge of adultery and its punishment is meted out to women, which is rarely the case for men. Furthermore, the current practice of Islamic law recognizes that men hold an unconditional, unconstrained and unilateral privilege to promulgate divorce whereas women have no reciprocal right, though the Qur'an documents reciprocity in the arena of rights and duties?

> ...but, in accordance with justice, the rights of the wives (with regard to their husbands) are equal (*mithl*) to the (husbands) rights with regard to them, although men have *a degree (of advantage)* over them (in this respect). And God is Almighty, Wise. (*Surah al-Baqarah*, 2:228)

According to the text of the Qur'an men have a degree of advantage over their wives regarding divorce (see 2:228) but essentially mutual rights remain "equal." Orthodoxy, on the other hand, has used the clause of "one degree" of advantage to strip Muslim women of their God-given rights. The entire emphasis of traditional Islamic law has been directed towards ensuring "one degree" of advantage to the man rather than on establishing the norm: of equality and reciprocity. This became possible, at least partially, with the advent of legalism: strict, literal, or excessive conformity to the law or to a religious or moral code. Legalism can also be understood as a fixation on laws, codes of conduct, or legal ideas, without balancing the mercy and

grace of God in the quest for salvation. In Islam's history, legalism culminated in hair-splitting efforts over the most minute details of life. For example, the Hanafi and Shafiʿi schools do not define the '*wajib*' (required) in the same way. The Hanafi school makes a technical distinction between *fard* (obligatory) and *wajib* (required), whereas there is no such distinction in the Shafiʿi school. Despite this minor difference, for considering *witr* prayer *wajib*, one Shafiʿi scholar hurled the charge of *kufr* (disbelief) against Abu Hanifah because he thought the Imam had elevated this prayer to the level of an obligation. This was not, in fact, the case.[100] As extreme an example as this, it does serve to emphasize that the minutest of detail can be whipped up to cause a state of anxiety in the minds of the people leading them to question whether they are being "perfect" in their worship as well as in everything else. These are among the hallmarks of the legalistic mindset. Islam, of course, does not teach or demand robotic perfection; rather, it deems human beings to be thinking, but fallible, and hence, imperfect creatures worthy of God's benevolence:

> Had human beings not committed any sin, He would have replaced this species with another species that would commit sin so that He could forgive them.[101]

Though not a license or encouragement to sin, nevertheless these words are the positive acknowledgement of human frailty and imperfection. The legalistic mindset and approach, on the other hand, is inconsistent with this recognition of human nature.

Legalism suffers from legalistic reductionism. Everything is viewed from a legal perspective. Legalism fosters hair-splitting inhumanity. Legalism creates an environment where people are constantly worried about being improper, even though the Prophet has clearly and emphatically warned against it:

> Ruined are those who indulge in hair-splitting.[102]

> A person who would be thoroughly scrutinized (on the Day of Judgment by Allah) is ruined.[103]

Perhaps more importantly, legalism on the one hand makes people self-righteous, while on the other it induces in them a trait towards the judgmental about their fellow human beings. However, God is the ultimate Judge and He is most emphatic about anyone attempting to occupy His seat of judgment:

> Narrated Abu Hurayrah: I heard the Apostle of Allah (p) say: "There were two men among Banu Isra'il, who were striving for the same goal. One of them would commit sin and the other would strive to do his best in the world. The man who exerted himself in worship continued to see the other in sin. He would say: 'Refrain from it.' One day he found him in sin and said to him: 'Refrain from it.' He said: 'Leave me alone with my Lord. Have you been sent as a watchman over me?' He said: 'I swear by Allah, Allah will not forgive you, nor will he admit you to Paradise.' Then their souls were taken back (by Allah), and they met together with the Lord of the worlds. He (Allah) said to this man who had striven hard in worship; 'Had you knowledge about Me or had you power over that which I had in My hand?' He said to the man who sinned: 'Go and enter Paradise by My mercy.' He said about the other: 'Take him to Hell.'" Abu Hurayrah said: "By Him in Whose hand my soul is, he spoke a word by which this world and the next world of his were destroyed."[104]

At another level, legalism shifts attention away from the values and principles that represent the essence of Islam. Legalism also reflects a preoccupation with laws and codes, often delinked from their purpose and spirit, which leads to overemphasizing form over substance or ritual over the values and consciousness underlying those rituals.

Lest it is misunderstood, in matters concerning individual ritualistic worship, the explicitly and categorically mandated forms, Muslims are to follow them faithfully to the letter. However, in terms of the underlying purpose behind those rituals and in relation to the broader behavioral aspects of life the legalists forgot or ignored the Prophet's teaching:

> Verily Allah does not look to your appearance or wealth, but he looks to your hearts and your deeds.[105]

Another major problem with legalism is that, due to its preoccupation over hair-splitting details, everything appears to become important, without any sense of prioritization. However, as human nature cannot be preoccupied with everything concurrently, focus on the detail shifts attention away from the larger picture. In a legalistic environment, ultimately, everything does not remain important. Instead, people become preoccupied with smaller matters or petty details, while bigger matters get neglected. The underlying connection with the larger tapestry of life becomes severed. Conversely, the Qur'an clearly educates the Muslims that there is a hierarchy of priorities and what these are constituted of, see *Surah al-Nisa'*, 4:31.

In such a legalistic environment as this, the preoccupation to straighten the lines during congregational prayers becomes manifest, the whole arrangement appearing as if it concurs with a form of military-discipline. However, as soon as the faithful step outside the mosque they forget about the value of discipline and organization; this is immediately reflected in the dreadful traffic behavior seen on the streets of many Muslim-majority countries. The meticulous attention to *taharah* (cleanliness) paid by the common adherent is also apparent. These same people, who take extra time and care to ensure that water reaches every nook and cranny of each designated part, including the inside of the nostrils, pay scant attention to the way in which their garbage is disposed of, scattering it everywhere without regard to health concerns. Then there is the close attention paid to following the Imam of the congregational prayer whereby he must be followed in every possible way such that prostrating or raising one's head before the Imam may annul an individual's prayer. Anyone imposing himself as the Imam during prayer deserves repudiation from the Islamic viewpoint. However, when bigger Imams (leaders) impose themselves as dictators, monarchs, or military juntas, the same people and their religious leaders demonstrate not the slightest dissent.

Muslim women are finding that legalism combined with male-dominance has created a fundamental insensitivity toward women's rights and concerns. Many better educated women are rediscovering Islam and revolting against male-dominated legalism, which they now realize is not necessarily sanctioned by the belief.[106]

Influenced by legalism, interest-free financial institutions are cropping up everywhere. From the legalistic perspective, it is argued that interest is *haram* (prohibited), an important rationale for this prohibition being that it is unjust and exploitative. However, these concerns are merely rhetorical as the new institutions in question have become too cozy within their own exploitative environment, about which they are mute.[107] Thus, there is movement to meet specific legal requirements from the orthodox perspective, but there is hardly any progress in addressing the widespread problem of poverty, destitution, and exploitation in the broader society.

The burden of legalism, enshrined in the misunderstanding and misinterpretation of the Shari^{c}ah, which Khan calls "the tyranny of legalism," has become overwhelming for Muslim society.

In addition to legalism, Islam has also become a victim of theology-orientation, where exclusionary purity of creeds and dogmas has robbed its soul. Whatever is believed in should be done with sincerity and purity, subsequent worship and practice (^{c}*amal*) being based on the Qur'an and the Prophetic example. However there is a difference between the correctness of a creed and its dogma on the one hand versus puritanism on the other. Khaled Abou El Fadl explains the nature and impact of this type of puritanism, which predictably leads to legalism:

> The theologically based attitudes of these Muslim puritans are fundamentally at odds not only with a Western way of life but also with the very idea of an international society or the notion of universal values. They display an intolerant exclusiveness and a belligerent supremacy vis-à-vis the other. According to their theologies, Islam is the only way of life, and must be pursued regardless of its impact on the rights and well-being of others. The straight-path (*al-sirat al-mustaqim*) is fixed, they say, by a system of divine laws (*shari'a*) that trump any moral considerations or ethical values that are not fully codified in the law. God is manifested through a set of determinate legal commands that specify the right way to act in virtually all circumstances. The sole purpose of human life on earth is to realize the divine manifestation by dutifully and faithfully implementing God's law. Morality itself begins and ends in the mechanics and technicalities of Islamic law (though different schools of Islamic law understand the content of those laws differently).

> A life devoted to compliance with this legal code is considered inherently superior to all others, and the followers of any other way are considered either infidels (*kuffar*), hypocrites (*munafiqun*), or iniquitous (*fasiqun*). Anchored in the security and assuredness of a determinable law, it becomes fairly easy to differentiate between the rightly-guided and the misguided. The rightly-guided obey the law; the misguided either deny, attempt to dilute, or argue about the law. Naturally, the rightly-guided are superior because they have God on their side. The Muslim puritans imagine that God's perfection and immutability are fully attainable on earth – as if God's perfection has been deposited in the divine law, and by giving effect to this law, we could create a social order that mirrors divine truth.[108]

God does not intend that this world should be a place of perfection, more important is facilitating the human connection to the Creator above all else. Indeed from the very beginning in the first story concerning a human soul – that of Adam and Eve – imperfection is the hallmark of humanity. That this imperfection is expected of mankind by its Originator is manifested in the titles that God has chosen for himself – the Most Forgiving (*al-Ghafur*) and Redeeming (*al-Tawwab*). God only desires that man will try not to err or to sin, but that if he fails, as he will, man will return to his Lord, sincerely acknowledging his failure and seeking His forgiveness. Legalism does away with all this when it attempts to project the divinity of God through the perfection and immutability of His guidance at the human level.[109]

Even though the purport of Islam is one of liberation, reality itself is hostage to both external and internal factors. Islam's message of moderation and balance then has been subverted by theological dogmatism, hair-splitting extremism and a mentality of enforcement. The remedy will require a fundamental shift – from a position of legalism to one involving greater balance, based on value-orientation.

(V) VALUE-ORIENTATION

A society's real character is a reflection of its values and principles. A legal system and environment also reflects the values and principles

that a given society upholds. To place laws above, or delink them from, values leads to legalism, this is akin to putting the cart before the horse. The traditional Islamic experience is a testimony to this fact; the Qur'anic revelation in the pre-Madinah period included almost no law or code. Rather, there was exhortation and guidance to prepare the community with a set of creeds, values and principles to lay its foundation. The detail concerning rituals, laws about society and the economy, or the commandments specifying the orders and prohibitions came about primarily during the Madinah period, when a polity had already been established and the community was prepared for an organized society with its unique legal framework and codes.

The Qur'an specifies few legal injunctions and offers much more in the way of guidance. The Prophet, during his exemplary life, put the same Qur'anic guidance into action. He provided the detail required to best realize the goals of those laws, injunctions and codes. The viability and strength of the nascent society did not lie in the enforcement of laws and codes in every aspect of life. Rather, it was based on a value system, nurtured by God-consciousness, which motivated people at the level of their consciences to seek and value divine guidance in molding their lives accordingly. With all the insight of the Creator the Qur'an informs us that human nature is fundamentally shaped by self-interest:

> If you do good, you do good for your own souls, and if you do evil, it is for them (in like manner). (*Surah al-Isra'*, 17:7)

It is true that the law of Islam includes extremely harsh punishments for deviations like adultery. However, even a punishment as serious as the death penalty cannot be considered a real deterrence when people care little about giving or taking life. In any case, the threshold for prosecuting any case of adultery is so high that it is virtually impossible. It is little surprise then that there was not a single case during the Prophet's lifetime where a Muslim, accused by others or by the state, was convicted and punished according to the law. However, there are cases, where a remorseful adulterer sought out the punishment, because Islam teaches that anyone who repents in this world and is

appropriately punished would not only avoid punishment in the life hereafter, but also that their repentance would elevate their status and honor with God.[110]

Because the appropriate value-orientation was facilitated by the Prophet there was law but no legalism. When it took on the form of legalism, particularly the poor and powerless and more especially women, became the victims of injustice in the name of Islam and the Shariʿah.[111] It is illustrative that the concerns of the *hudud* Laws in Pakistan do not include justice, but obedience to and implementation of laws that are grounded in divine revelation but only at the essential level. At the level of its detail, these laws are essentially a human construct. Moreover, their implementation at the hands of insensitive and all-too-fallible human beings, who neither understand nor appreciate even the concept of the rule of law and that these rules are meant for human beings, and not the other way around, can result in a tragic experience. Yahya Emerick rightly observes:

> Muslims have lost touch, generally, with the noble qualities of Islam, qualities such as compassion, understanding, tolerance and progressiveness (from within an Islamic framework, of course). We have become like the Bani Isra'il: steeped in legalism, harshness and intolerance. In the same way that Prophet Jesus was sent to breathe new life into them, we must learn to reinvigorate ourselves.[112]

If the Shariʿah is composed of both divine (the Qur'an) and non-divine (Hadith, Ijmaʿ, *Qiyas*, etc.) sources and foundations, and if it is the case that the non-divine overwhelmingly and disproportionately comprises its content, is it right to describe the Shariʿah as divine? The view of a well known female Muslim scholar, Riffat Hassan, makes precisely this point:

> Not surprisingly, then, most Muslims cannot conceive of being Muslim without adhering to Muslim laws as they know these while remaining ignorant of how these may have been derived or formulated. In the meantime, elevating the Shariah to the level of divinity renders it beyond challenge for the average Muslim. Refuting the divinity of Shariah, a feminist theologian asserts:

> Being a Muslim is dependent essentially only upon one belief: belief in Allah, universal creator and sustainer who sends revelation for the guidance of humanity. Believing in Allah and Allah's revelation to and through the Prophet Muhammad, preserved in the Qur'an is, however, not identical with accepting the Shariah as binding upon oneself...the assertion that one is a Muslim only if one accepts the 'Shariah' as binding on oneself, and, further, that the Shariah is divine, transcendent and eternal, can be seriously questioned (and, in my opinion should be).[113]

Therefore, how best can humans describe and understand the Shari'ah if, in general, it cannot be considered divine? Here are some suggestions:

> Shariah is often referred to as Islamic law, but this is wrong, as only a small part is irrefutably based upon the core Islamic text, the Koran. A correct designation is 'Muslim Law' (i.e. the law system of the Muslims), or 'Islam-inspired,' 'Islam-derived,' or even 'the law system of Muslims.'[114]

Khan aptly invites Muslims to: "Treat Islam as a *fountain of values* that guide conduct rather than a system of ready-made solutions to problems."[115]

So, what are the essential values that Muslims must uphold and integrate into their thought process, culture and legal framework? The following are illustrative and by no means exhaustive.

1. *Fundamental Human Dignity (Each Human As A Person, Not An Object Or Commodity)*

Each human being is considered a person, not an object. Slavery becomes possible only when human beings are regarded as objects that can be owned and traded.[116] The same thought process induces a legalistic view when treating or regarding the issue of the *mahr* (dowry) as a "price" in a trade.[117] God has sanctified each one of us at the human level, and Muslims should be at the forefront in upholding the fundamental right of human dignity:

> O mankind! Revere your Guardian-Lord, who created you from a single person, created, of like nature, His mate, and from them scattered (like

> seeds) countless men and women; revere Allah, through whom you demand your mutual (rights), and (revere) the wombs (That bore you): for Allah ever watches over you. (*Surah al-Nisa'*, 4:1)

> A person asked, "O Prophet of God (p), whose Islam is excellent or the best (*afdal*)?" He replied: "From whose tongue and hands *the people* (*an-nas* [irrespective of Muslim or non-Muslim]) are safe."[118]

2. *Justice*

Islam's emphasis on justice (fairness) is unequivocal. It sets a standard that is much higher compared to any other ideology or religion, exhorting its adherents to stand forth for justice even if this entails acting contrary to one's own interest:

> O you who believe! Stand out firmly for justice, as witnesses to Allah, *even as against yourselves*, or your parents, or your kin, and whether it be (against) rich or poor: for Allah can best protect both. Follow not the lusts (of your hearts), in case you swerve, and if you distort (justice) or decline to do justice, verily Allah is well acquainted with all that you do. (*Surah al-Nisa'*, 4:135)

Except in matters relating to ritual worship, all codes or laws must explain how they are just and how justice is served through the implementation of that rule in issues affecting the life, honor and property of the people. For example, a code cannot simply legislate that the widow of a missing husband must wait at least four, ten or an indefinite number of years before she can consider remarrying.[119] It must also explain how the law or requirement is just; it must especially consider the interest of the wife.

Justice, in general, must not also be considered relative as some religious scholars have erroneously argued.[120] Breaking away from the traditional mold, the eminent jurist Ibn al-Qayyim placed justice squarely within Islam and stressed the importance of linking the Shariʿah and Islam to justice as the proper perspective:

> The foundation of the Shariah is wisdom and the safeguarding of people's interests in this world and the next. In its entirety, it is justice, mercy and

> wisdom. Every rule which transcends justice to tyranny, mercy to its opposite, the good to the evil, and wisdom to triviality does not belong to the Shariah although it might have been introduced therein by implication. The Shariah is God's justice and mercy among His people.[121]

3. *Equality (and Non-Discrimination)*

Whether in terms of Muslim or non-Muslim, male or female, black or white the value-oriented norm of Islam is equality. In this world, as human beings all are equal, especially in terms of those rights relating to life, honor and property. Whatever good or virtue Muslims possess is rewarded by Allah in the life hereafter. At the human level though, each must regard the other as equal.

In two areas, the issue of equality is particularly important: gender and Muslim/non-Muslim relationships. For example, in the case of divorce, the Qur'an teaches:

> ...but, in accordance with justice, the rights of the wives (with regard to their husbands) are equal (*mithl*) to the (husbands); rights with regard to them, although men have *a degree (of advantage)* over them (in this respect). And God is Almighty Wise. (*Surah al-Baqarah*, 2:228)

The above verse confirms that the rights of men and women in this context are equal or reciprocal; this represents the Islamic norm. However, the Shariʿah has instituted widespread inequality instead leading to male precedence supplanting the norm. In the case of divorce, the preponderant practice of Islamic law has accorded not a degree but virtually unconditional, unrestrained, and exclusive advantage to men.

From the Qur'anic perspective, gender relationships are essentially based on mutual guardianship (*wilayah*):

> The Believers, men and women, are protectors [*awliya'*: protectors, guardians, patrons] one of another: they enjoin what is just (*maʿruf*), and forbid what is evil (*munkar*): they observe regular prayers, practise regular charity, and obey Allah and His Messenger. On them will Allah pour His mercy: for Allah is Exalted in power, Wise. (*Surah al-Tawbah*, 9:71)

Similarly in respect of life, regardless of religious background it should be treated in a humanity-oriented manner:

> On that account: We ordained for the Children of Israel that if any one slew a person – unless it be for murder or for spreading mischief in the land, it would be as if he slew the whole people; and if any one saved a life, it would be as if he saved the life of the whole people. Then although there came to them Our Apostles with clear signs, yet, even after that, many of them continued to commit excesses in the land. (*Surah al-Ma'idah*, 5:32)

If the above verse has any meaning and relevance in the context of justice, then, regarding life, there can be no discrimination. In the case of murder, the punishment of a Muslim murdering a non-Muslim cannot be less than the punishment of a non-Muslim murdering a Muslim.

4. *Freedom*

That the edifice of Islam is based on free choice not coercion is one of the pivotal aspects of the value-orientation approach. If Islam is to become relevant once again there must be recognition of the foundation of free choice for those who embrace the belief. Coercion may facilitate cursory compliance, but it can never win the hearts of people who will disavow what they do not believe in at the very first opportunity – thus giving rise to the potential for dissent from within. When the Prophet and his nascent community faced severe and persistent persecution Allah emphatically reminded the Prophet to cherish freedom. Subject to the usual parameters that apply in any healthy and functional society, no-one has the right to remove the fundamental right to choice and freedom:

> I do call to witness this City; And you are a *free person* (*hillun*) of this City; And (the mystic ties of) parent and child; Verily We have created man into toil and struggle. (*Surah al-Balad*, 90:1–4)[122]

> Whosoever chooses to believe shall do so, and whosoever chooses to disbelieve shall do so. (*Surah al-Kahf*, 18:29)

(a) All aspects of the belief in Islam are essentially applicable to adults who are free to choose. Thus, the traditional effort to culturalize Islam, that is, expecting Muslim offspring and the younger generation to be Muslims *automatically*, is preposterous and inconsistent with the belief.[123] Believing in Islam entails attempting to practice and follow it in the best way possible according to one's own understanding. Acting as an example for others, and especially for one's own children, is a central component; as is helping one's children understand Islam as they grow up and assisting them in understanding why making choices is important, as well as the consequences of those choices. Conversely, it is not appropriate for anyone, including those nearest to oneself, to either dogmatically or blindly accept faith merely according to the demands of elders. Each soul must affirm its own identity. Islam as a way of life is no longer dynamic because the first of its pillars – *shahadah* (freely made public affirmation or declaration of submission) – has been rendered irrelevant.

When children grow up and make choices not to a parent's liking these must be respected, at the same time as attempting to improve their guidance besides maintaining faith in them. Nevertheless, every adult of whatever gender must arrive at their own personal determination. If a choice of this nature is made freely and spontaneously then the true message of Islam will become manifest and Islam will stand a chance of once again revolutionize the world. Thus, instead of displaying antagonism and rejection towards a child when it makes a wrong choice, love and empathy is alternatively required. This appears to be the only pathway open to make amends; animosity and rejection, on the other hand, bars the road towards reconciliation and reconsideration. Ultimately, the matter of someone born into a Muslim family who later renounces their Islam (i.e. commits apostasy) has to be faced. From the traditional legalistic and judgmental perspective apostasy is an issue that concerns the law and which carries the *hadd* punishment, usually interpreted as execution.

This particular approach and position is most unfortunate especially in the context of the revivalist movement to re-establish the *khilafah* (caliphate). Muslims generally revere the period of the *khulafa' al-rashidun* (the rightly guided caliphs) and regard that part of Islamic

history as exemplary. Furthermore, they also hold that this earliest stage establishes the essence of the *khilafah* as the Islamic political system. However, proponents for the revival of the Islamic State in the present time may also be acting as an obstacle in persuading the broader Muslim community in favor of the caliphate due to their own dogmatic understanding. One example is Hizb al-Tahrir (HT) which has taken up the re-establishment of the *khilafah* as its core mission. In the draft constitution (*al-dustur*), proposed by its founder Taqiuddin al-Nabhani (d. 1977 CE) and fully adopted by HT, Article 7c states:

> Those who are guilty of apostasy (*murtad*) from Islam are to be executed according to the rule of apostasy, provided they have themselves renounced Islam.[124]

This position is unwarranted from the Islamic viewpoint due to the lack of evidence for it. However, matters are further compounded when the draft constitution goes still further (in the same Article):

> If they are born as non-Muslims, i.e., if they are the sons of apostates, then they are treated as non-Muslims according to their status as being either polytheists (*mushriks*) or People of the Book.[125]

Most contemporary Islamic thinkers repudiate this violation of freedom of belief as un-Islamic and now reject the traditional position.[126] The issue of apostasy (*irtidad*) involves treason against the Islamic State, not renouncement of one's faith. Thus, once again, in keeping with Islamic principles and values, this area is not a legal matter or one of enforcement.[127]

(b) Another topic where freedom and coercion has special relevance concerns the case of women in general and marriage in particular. Women must be regarded and treated as full and independent humans, as per Value No. 1 above. After all, they too have to stand before Allah and be accountable as full human beings. For this to transpire requires a better understanding of the gender relationship in Islam. Mature adult women are not to be dependent on men. A life of

marriage is not a life of servitude; it is a relationship of mutual guardianship (*wilayah*) over each other (*Surah al-Tawbah*, 9:71). Islamic dependence should be mutual. Some western models promote independence to the extent that women are encouraged not to need men, and vice versa. This is another form of extremism for which western societies are already beginning to pay a high price in the form of broken families which exact a heavy toll on children, causing them to suffer from alienation and depression as well as increasing violence and other social ills. In contrast, the prevailing mode of Muslim societies is that women are not treated or allowed to develop as full human beings. Muslim men – and these days Islamic scholarship is almost the exclusive domain of men – have become the sole arbiter of the lives of Muslim women. A return to a genuine form of Islam necessitates that women achieve the qualification of jurisprudents, establish themselves as scholars and policy-makers, and play their role in performing the *shura* (consultation) required to shape Islamic thought and guidance in all aspects of life.

A fundamental Islamic principle states that those whose lives are likely to be affected by a decision should have an appropriate level of input and representation during the process. Evidence for this stance is derived from the case of prophet Ibrahim who, in his devotion to God's commandment to sacrifice what was dearest to him (his first son), the son is asked for his opinion on the matter:

> He [Ibrahim] said: "O my son! I see in vision that I offer you in sacrifice: Now see what is your view!"... (*Surah al-Saffat*, 37:102)

The Prophet himself involved his community – male and female – in deciding the strategy to follow during the Battle of Uhud and despite the less than favorable outcome for the Muslims the consequences of the decision cannot be held to mitigate against the need to institute a process of consultation and representation nevertheless. Earlier, Muslim women happened to be among the participants who swore the Allegiance of Ridwan to the Prophet; this is reason enough not to tolerate the absence of Muslim women in juristic and Shari'ah related matters, particularly in those deliberations that affect them. Of

course, women should be part of juristic discourse at all levels, including at the very highest level of ijtihad. Muslims should find the absence of women a serious violation of the Qur'anic view about women being men's mutual *awliya'* (guardians). And any juristic position that deviates from this position should be regarded as deficient. In other words, any juristic view, position, opinion or fatwa involving women which emanates solely from an exclusively male club of jurists should be considered deficient by default unless proven otherwise and incontrovertibly. As far as the general juristic discourse occurs in the present, that one half of the mutual *awliya'* is absent must be acknowledged. Some effort needs to be effected to remove this imbalance and deficiency gradually but surely, not out of some benevolent generosity to women, but for the benefit and wholeness of society. The revered generation of Companions who accompanied the Prophet were not complete without ʿA'ishah, Umm Salamah and other women who acted as mentors, guides, teachers and jurists. This state of affairs should be true for all time, where, for a balanced community, men and women must play their role as mutual *awliya'* of each other.[128]

(c) Probably the biggest and broadest area relating to choice and coercion involves the role of the state in Islam. In light of the experience with Islamic law and its incorrect application, many Muslims, as well as most non-Muslims, now have tremendous reservations about Islamic law, or the mixing of political power with religious authority. The pertinent issues need to be examined carefully and taken into consideration with considerable empathy and sensitivity. Many Muslims and non-Muslims who are afraid of a "religious" or theocratic state may have good reason to fear; it is not necessarily that they all harbor ill-will or have a prejudiced attitude towards Islam. Without properly addressing the issues it will be impossible to persuade them in favor of Islam (even before an Islamic society is ever established) and to maintain the bond between Islam and the people so that it is dynamic (after the emergence of such a society).

The experience of those countries trying to implement the Shariʿah, as discussed earlier, plays a very important role in shaping most people's attitude towards Islam. Islam does not envision or advocate a

police state or of thrusting itself down the throats of anyone. In some cases, particularly in the context of the Taliban rule in Afghanistan, even Islam's enemies could not do a better job of alienating Muslims from Islam.

Islam envisages authority or government as constitutional, participatory and accountable to the people. Under normal and mature conditions, an Islamic government would use the least amount of power, authority and coercion necessary. An Islamic authority possesses executive power, but must use this judiciously, under the rule of law and within constitutional restraints. Islam has already limited authority in a balanced manner. Unfortunately, there does not seem to be adequate appreciation of this among Muslims, let alone non-Muslims. The government in an Islamic society does not pry into people's lives; there is no room for the existence of a "religious police" within its orbit. It has no sanction to fill up its appropriately few prisons with those who do not pray or fast, neither can it allow women who do not cover their head or allow some strands of hair to be exposed to be beaten. If a government forces people in this way because of its might and authority then the persuasive power and attraction of Islam – "Truth stands out clear from Error" (*Surah al-Baqarah*, 2:256) – remains open to question. Sooner or later, coercive acts will not go unchallenged by those who are coerced.

In a nascent Islamic society, as per any society in its formative stage, some authoritative power to shape the values and norms of the society is indispensable. For example, in a drug-infested society there might be sterner action against drug-traders. But any such power cannot be abusive and it must not be used to suppress political opposition otherwise it would be simply counter-productive.

(d) People must be allowed to choose their own faith. If someone wants to choose another, Islam should not get in the way. It is a gross misunderstanding and distortion of Islam that a person relinquishing their belief in Islam needs to be punished:

> If it had been your Lord's will, they would all have believed, – all who are on earth! Will you then compel mankind, against their will, to believe! (*Surah Yunus*, 10: 99)

In addition, there needs to be fresh articulation of the rights of non-Muslims in an Islamic society. Both at the time of the Prophet, as well as after him, there were many non-Muslims who desired to migrate and live in the Islamic society. Why that was the case is because Islamic society is pluralistic and inclusive. Correspondingly, in the current age the traditional viewpoint on issues that affect non-Muslim citizens like the *jizyah* (poll tax), political participation and their right to hold office, needs to be re-examined:

> ... Muslims need to appreciate the importance of freedom not just for themselves but also *for all of humanity*. If Muslims value freedom it can't be just for them. They have to value freedom of others too, even though sometime they may find certain ideology, religion or philosophy disagreeable. At the very first sign of others criticizing or vilifying Islam, Muslims can't demand their head or try to drive them out of our neighborhood or of this planet. ... A past-enriched, but forward-looking perspective requires that Muslims need to recognize the importance of freedom, and struggle for it at all levels. They also need to recognize the challenge of conceiving a model of a society where merely the freedom of Muslims is not an exclusive concern, but also the freedom of others. That should be the meaning of this Ummah (people) being "evolved for the humanity" (*Surah Al ʿImran*, 3:110).[129]

The bottom line is that Islam is based on the paradigm of choice and freedom, not coercion or autocracy. Those who forcefully push for their version act inconsistently, are contradicted by this key verse in the Qur'an and contradict one of Islam's fundamental values. Furthermore, Muslims face a major challenge in reshaping their society to ensure that it conforms to the values of freedom and choice which balances with the overall standards and norms of Islam.[130]

5. *Universal Moral Values (Maʿruf)*

> You are indeed the best community that has ever been brought forth for [the good of] mankind (*al-nas*): you enjoin the doing of what is right (*maʿruf)* and forbid the doing of what is wrong *(munkar)*, and you believe

> in God. Now if the followers of earlier revelation had attained to [this kind of] faith, it would have been for their own good; [but only few] among them are believers, while most of them are iniquitous. (*Surah Al ʿImran*, 3:110)

The Qur'anic call toward *maʿruf* and away from *munkar* relates to moral values in the universal sense. Both *maʿruf* and *munkar* have a broad range of meanings and a clear understanding of these two concepts is critical to a Muslim's life.

Maʿruf is held to mean that which is well known; universally accepted; generally recognized; good, beneficial, and right. *Munkar*, on the other hand, connotes that which is wrong; abominable; disagreeable; denied; not recognized; rejected; evil, and includes the notion of atrocity.

The Islamic Shariʿah represents both the *maʿruf* and *munkar* because it incorporates what is universally recognized as good and right and rejects what is universally recognized as evil and wrong. For example, no society considers stealing or lying to be good and correct, even though some people may practice these acts. Every society considers honesty to be a virtue, even though some people are dishonest. Calling mankind to *maʿruf* and away from *munkar* thus represents the universal nature of Islam.

The Muslim Ummah does not exist for its own sake. It has a definite mission, a divinely ordained service to render to humankind. As Abdullah Yusuf Ali, a well known commentator on the Qur'an explains:

> The logical conclusion to the evolution of religious history is a non-sectarian, non-racial, non-doctrinal, universal religion which Islam claims to be. For Islam is just submission to the will of God. This implies (1) faith, (2) doing right, being an example to others to do right, and having the power to see that right prevails, (3) eschewing wrong, being an example to others to eschew wrong, and having the power to see that wrong and injustice are defeated. Islam [the author probably meant the Muslim Ummah] therefore lives, not for itself, but for mankind.[131]

Unfortunately, this sense of universality has been lost along the way under the influence of puritanical fundamentalism. As Khaled Abou El Fadl reflects:

> The puritans construct their exclusionary and intolerant theology by reading Qur'anic verses in isolation, as if the meaning of the verses were transparent – as if moral ideas and historical context were irrelevant to their interpretation. In fact, however, it is impossible to analyze these and other verses except in light of the overall moral thrust of the Qur'anic message. The Qur'an itself refers to general moral imperatives such as mercy, justice, kindness, or goodness. The Qur'an does not clearly define any of these categories, but presumes a certain amount of moral probity on the part of the reader. For instance, the Qur'an persistently commands Muslims enjoin the good. *The word used for 'the good' is ma'ruf, which means that which is commonly known to be good.* Goodness, in the Qur'anic discourse, is part of what one may call a lived reality – it is the product of human experience, and constructed normative understandings.[132]

This kind of exclusivist mentality not only stands in the way of witnessing Islam as the essential truth, but it also alienates the rest of the world by way of promoting a negative understanding about and attitude towards Islam and the Muslims. The emphasis on *maʿruf* does not entail that there are no special or distinctive aspects of Islam in the applied sense. However, Muslim focus should have been appropriately balanced by a universalistic dimension, which would have enabled humanity to appreciate the fact that Islam is not a new religion, that it is the same essential truth and message brought by all the prophets, including Abraham, Moses, and Jesus.

6. *Humanity-Orientation and Global Belonging*

> You are indeed the best community that has ever been brought forth for [the good of] mankind (*al-nas*): you enjoin the doing of what is right (*maʿruf)* and forbid the doing of what is wrong (*munkar)*, and you believe in God. Now if the followers of earlier revelation had attained to [this kind of] faith, it would have been for their own good; [but only few] among them are believers, while most of them are iniquitous. (*Surah Al ʿImran*, 3:110)

> O mankind (*al-Nas*)! revere your Guardian-Lord, who created you from a single person, created, of like nature, His mate, and from them twain scattered (like seeds) countless men and women;- revere Allah, through whom you demand your mutual (rights), and (revere) the wombs (That bore you): for Allah ever watches over you. (*Surah al-Nisa'*, 4:1)

At one level all humans belong to a family. At another they belong to a nation or country. On a quite different level the Muslims belong to the Muslim Ummah. At yet another level all belong to humanity. None of these senses of belonging necessarily need conflict with each other. One's family and nation are often not choices of one's own; individuals are born into them, belonging to a family and circle of relatives through biological and other bonds. National belonging is becoming more fluid at this juncture with the greater global mobility of people. Nevertheless, it is quite possible to maintain ties to the part of the world one originates from without conflict while remaining loyal to the place of permanent residence. Muslims need to make this clear to the people of the countries to which they emigrate.

Muslims additionally need to nurture, develop and feel a special bond for the global Muslim community, the Ummah. Because Islamic identity is one of choice, not lineage, this sense and level of belonging is of great importance. However, even this attachment must not be allowed to conflict with the requirement to remain associated with the rest of humanity. It is through this spirit of affinity that the meaning of the Qur'anic phrase "evolved for mankind" becomes realized.

The achievements and joy of humanity are not isolated from the Ummah, and Muslims must have a share in it and must not only rejoice in the good things that happen to other Muslims. Succumbing to a sense of estrangement that leads to the default view that the rest of the world constitutes "the other" must be resisted. The pain and agony of the suffering of Muslims alone cannot be the only imperative. Muslims need to be in tune with the tribulations of humanity at large.

Muslim laws must not unnecessarily foster mutual estrangement. Instead, imbued with the spirit of global belonging, Muslims must seek common ground concerning worthy causes. Muslims should be at the forefront of fostering the spirit of global belonging.[133]

7. *Representation and Participation (Shura)*

> ... that which is with God is better and more lasting for ... those who hearken to their Lord (Rabb), and establish regular prayer, who (conduct) their affairs by *mutual consultation*, who spend out of what We bestow upon them for sustenance. (*Surah al-Shura*, 42: 36, 38)

Consultation or *shura* is a vital process and important institution in Islam. Different levels of relationship in Islam are based on consultation rather than on coercion or imposition. Thus, the concept of governance, administration and leadership is participatory – meaning that those who are affected by the decision are duty bound to be duly consulted. The Islamic form of governance is inclusive and accountable.[134]

In general, anyone whose life is affected by a decision has the right to have their opinion considered, except in the case of the insane or immature. This process of consultation should be organized institutionally wherever appropriate, relevant and feasible.

The principle of *shura* is critical in a value-oriented context because its common Shariʿah usage is neither divine nor sacred in origin. Muslim individuals or groups can formulate or hold a specific view, but when something becomes a matter of law it must attain legal status through an institutionalized process of *shura*. This has implications for every aspect of the foundational sources of Islam because, at the interpretative level, these all lead to widely divergent opinions, often within each school.

Once it is agreed that understanding and interpreting divine guidance must be regarded a human construct and, accordingly, cannot be bestowed the status of the sacred, the gap between transcendent guidance on the one hand and law on the other must be mediated by the process of *shura*. A particular product of jurisprudence to be considered for legislation then is not accorded authoritativeness by a mere consensus that is generally non-existent nor *Qiyas* that is speculative. Rather, it is so accorded by way of mediation through *shura*. The implication of this recommendation is further elaborated in the case of the Hadith, Ijmaʿ and *Qiyas* in the following chapters.

Indeed, *shura* does not imply the mechanism of a monarchical, military junta or autocratic authority appointing a consultative council. Instead, all authority must be accorded through the process of *shura*. Thus, as far as Islamic governance is concerned, *shura* is incompatible with any consultative body appointed by autocratic decree.

8. *Rule of law*
The essence of the rule of law in Islam is summarized according to four points:

(a) Equality of all before the law, with no-one being above it, where the laws are based on objective, accessible rules;
(b) An independent judiciary;
(c) Enforcement of the law is civil and non-partisan;
(d) Conflict resolution occurs either through the legal system, the political system or both without involving violence on the part of the citizens or State.

The Shari^{c}ah is perverted at its root or core when people are considered above the law, as in the case of dictators, monarchs, or military juntas and the like. Contrast this with the Prophet himself who was never above the law. The implementation of the Shari^{c}ah cannot be considered Islamic except under the rule of law in accordance with Islam:

> Say: I would, if I disobeyed my Lord, indeed have fear of the penalty of a Mighty Day. (*Surah al-An^{c}am*, 6:15)

> O you who believe! stand out firmly for Allah, as witnesses to fair dealing, and *let not the hatred of others to you make you swerve to wrong and depart from justice*. Be just: that is next to piety: and fear Allah. For Allah is well-acquainted with all that you do. (*Surah al-Ma'idah*, 5:8)

> 'A'isha reported that the Quraish had been anxious about the Makhzumi woman who had committed theft, and said: "Who will speak to Allah's Messenger (pbuh) about her?" They said: "Who dare it, but Usama, the loved one of Allah's Messenger (pbuh)?" So Usama spoke to him.

> Thereupon Allah's Messenger (pbuh) said: "Do you intercede regarding one of the punishments prescribed by Allah?" He then stood up and addressed (people) saying: "O people, those who have gone before you were destroyed, because if any one of high rank committed theft amongst them, they spared him; and if anyone of low rank committed theft, they inflicted the prescribed punishment upon him. By Allah, if Fatima, daughter of Muhammad, were to steal, I would have her hand cut off."[135]

In any system where one individual or office is above the rule of law this should render it essentially un-Islamic and illegitimate in the eyes of God. Muslims should regard dictatorship or monarchy based on the absolute authority of one individual, family or group as un-Islamic and unacceptable. For the same reason, any law, the Hudud Ordinance in Pakistan, once again, being a pertinent example, promulgated by an illegitimate ruler or ruling system should not be regarded as Islamically valid.[136]

9. *Seeking Common Ground for Mutual Good*

> Say: 'O people of the Book! *come to common terms* as between us and you: that we worship none but God; that we associate no partners with Him; that we erect not, from among ourselves, lords and patrons other than God.' If then they turn back, say: 'Bear witness that we (at least) are Muslims (bowing to God's Will).' (*Surah Alʿ Imran*, 3:64)

It is a common human tendency to emphasize and exaggerate differences more than commonness. Muslims are no exception to this. Islam invites people to the pristine truth. It delivers the good news and warns about bad tidings. However, whenever appropriate and possible, it also seeks to identify and build on common ground. This is what made the Islamic society of Madinah under the leadership of the Prophet possible. Islam presents choice to people concerning truth and falsehood, right and wrong, virtue and vice. They are allowed to make their own determination in these matters. However, Islam also teaches its adherents to seek common ground for the betterment of human society, particularly based on commanding *maʿruf* (good) and forbidding *munkar* (evil):[137]

> ...help (cooperate) one another in matters of *Birr* (righteousness) and *Taqwa* (piety); and do not help (cooperate) in *Ithm* (sin) and transgression....(*Surah al-Ma'idah*, 5:2)

10. *Rejection of Violence As Normal*

In Islam peace and non-aggression are the norms. Islam rejects violence in the form of unjustified aggression, but does not proscribe violence in the form of justified use of force. However, the only form of violence permissible is in self-defense, without its initiation, without committing excesses, and subject to strict guidelines as part of the rule of law. Otherwise, it is never permissible for Muslims to engage in violence, especially in a vigilante manner:

> *Let there be no hostility* except to those who practice oppression. (*Surah al-Baqarah*, 2:193)

> *To those against whom war is made, permission is given (to fight)*, because they are wronged;- and verily, Allah is most powerful for their aid;...
> (They are) those who have been expelled from their homes in defiance of right,- (for no cause) except that they say, "our Lord is Allah." Did not Allah check one set of people by means of another, there would surely have been pulled down monasteries, churches, synagogues, and mosques, in which the name of Allah is commemorated in abundant measure. Allah will certainly aid those who aid his (cause);- for verily Allah is full of Strength, Exalted in Might, (able to enforce His Will). (*Surah al-Hajj*, 22:39–40)

> Fight in the Way of God *against those who fight you*, but do not go beyond the limits. God does not love those who go beyond the limits. (*Surah al-Baqarah*, 2:190)

It is interesting to note that Muslims did not have permission to reciprocate against the violence meted out to them when they were oppressed, downtrodden and persecuted in the earliest period of Islam. This remains the Islamic norm. Later, permission was granted to reciprocate in self-defense, without initiating aggression or committing any excess.

In some respects, even modern non-violent movements have been influenced by the legacy of the Prophet:

> [T]he full potential of Islam to address social and political conflicts is yet to be fully realized. Both Islamic religion and tradition have a multitude of resources with which conflicts can be resolved peacefully and nonviolently. Islamic scripture and religious teachings are rich sources of values, beliefs, and strategies that promote the peaceful and nonviolent resolution of conflicts. Awareness of the Qur'an, and the Prophetic tradition, and the early Islamic period is indispensable for understanding Islam, since these scriptures and traditions have continued to provide a paradigm for emulation by Muslims and Islamic movements in every age, and their influence can be traced in every philosophical, ideological, and scientific inquiry among Muslims. Moreover, the impact of the Islamic early period and the Qur'an is clearly discernable even in modern non-violent movements, such as Mahatma Gandhi's philosophy and methods of nonviolence, as McDonough and Satha-Anand show.[138]

The life of the Prophet is exemplary in his conscious effort to avoid violence. Even before becoming the Prophet, he was invited by his community to act as the final arbiter in resolving their disagreement about the placement of the sacred Black Stone in the precinct of the Kaʿbah. He demonstrated not just his leadership, but also how to approach conflict through a peacemaking framework. The subsequent history of the Muslims did not succeed in upholding this ethos at all times and in all places, unfortunately.

Islam does not preach absolute non-violence. However, it neither advocates nor glorifies violence (the use of force), except in the greater interest of peace and justice.[139] It does, however, categorically emphasize peacemaking. Islam permits fighting for the purpose of self-defense and the preservation of life. However, even in these situations (as mentioned in *Surah al-Baqara*, 2:190) Islam imposes many humanitarian and moral limits to prevent the perpetration of excesses. Thus, Abu-Nimer argues:

> Islam yields a set of peacebuilding values that, if consistently and systematically applied, can transcend and govern all types and levels of conflict,

> values such as justice (*adl*), beneficence (*ihsan*), and wisdom (*hikmah*) which constitute core principles in peacemaking strategies and framework.[140]

Indeed, when Muslims are neither attacked nor threatened, and their adversaries are inclined towards peace, the Qur'an leaves no room whatsoever for anything other than reciprocation:

> But if the enemy inclines towards peace, you (also) incline towards peace, and trust in Allah. (*Surah al-Anfal*, 8:61)

11. *Non-judgmental*

As Allah's judgment will be in place in the life hereafter it is important that all verdicts concerning matters of worship should be deferred to Allah alone and Muslims must not judge their fellow human beings in this regard:

> This is because when Allah alone was called upon, you disbelieved, and when associates were given to Him, you believed; so judgment belongs to Allah, the High, the Great. (*Surah al-Ghafir*, 40:12)

This is an important concept, especially in the context of a dogma and attitude that persists among some Muslims that they already *know* who in this world (as a group) will not be going to heaven. It is correct to espouse a belief in Islam because it is considered the truth. Yet, judgment remains Allah's alone – there being Qur'anic verses that indicate His decree might not be as exclusive as many think:

> Those who believe (in the Qur'an), and those who follow the Jewish (scriptures), and the Christians and the Sabians,- any who believe in Allah and the Last Day, and work righteousness, shall have their reward with their Lord; *on them shall be no fear, nor shall they grieve*. (*Surah al-Baqarah*, 2:62)

The meaning of the passage "on them shall be no fear, nor shall they grieve" is not clear. If any additional conditions for salvation – the most important thing – exist why would those conditions not be specified in

the Qur'an at this point? It is implausible that Allah changed his intention later or that He permitted ambiguity because he had not decided the matter. To leave such a fundamental issue to be dealt with in the Hadith is inexplicable. In truth, these are theological concerns about which a dogmatic approach is not helpful one way or another. In the final analysis, judgmentalism only serves to unduly alienate others and make Muslims become either arrogant or self-gratified in the unwarranted belief that heaven is exclusively theirs. As El Fadl explains:

> Although the Qur'an clearly claims that Islam is the divine truth, and demands belief in Muhammad as the final messenger in a long line of Abrahamic prophets, it does not completely exclude the possibility that there might be other paths to salvation. The Qur'an insists on God's unfettered discretion to accept in His mercy whomever He wishes. In a rather remarkable set of passages that, again, have not been adequately theorized by Muslim theologians, the Qur'an recognizes the legitimate multiplicity of religious convictions and laws.[141]

12. *Emphasis On Substance Over Form*

> 'Faith' has become a mere figure of speech, a mere empty word devoid of that spark of *enthusiasm* which in the early days of our [Islamic] history inspired the Muslims to imperishable deeds of cultural and social achievement. No doubt, Islam is still alive as an *emotion*. It is alive in the instinctive love of countless millions of people who vaguely feel its principles are 'right': but only very few of them grasp those principles intellectually and are able, or genuinely prepared, to translate them into terms of practical life. [142]

Human existence, as well as the universe of which man is part, is composed of different forms. Thus, form in itself is important allowing things to be recognized. Much of the actions one does in life have some form. However, forms are generally meaningful in the context of their purpose or objective. Thus, Muslims turn in the direction of the *qiblah* when they pray and the prayer itself possesses certain ritualistic forms. However, Islam is clear that all the forms it mandates or expects are not delinked from the substance or underlying purpose of these:

> It is not righteousness that you turn your faces towards east or west; but it is righteousness- to believe in Allah and the Last Day, and the Angels, and the Book, and the Messengers; to spend of your substance, out of love for Him, for your kin, for orphans, for the needy, for the wayfarer, for those who ask, and for the ransom of slaves; to be steadfast in prayer, and practice regular charity; to fulfill the contracts which you have made; and to be firm and patient, in pain (or suffering) and adversity, and throughout all periods of panic. Such are the people of truth, the Allah-fearing. (*Surah al-Baqarah*, 2:177)

> The Prophet said: "Verily Allah does not look to your appearance or wealth, but he looks to your hearts and your deeds."[143]

This is a most fundamental problem facing Muslims today; substance, in terms of the underlying spirit or value, has become delinked from forms and rituals. Thus, memorization of some chapters or the entire Qur'an is hugely emphasized in preference to studying and understanding its message.

Common Muslims are devoted to their worship based on the five rituals of Islam (public declaration of faith, prayer, fasting, almsgiving, and pilgrimage).[144] Each ritual is profoundly related to specific values that Islam wants to inculcate among its adherents. Thus, regarding salah (prayer), which Muslims are normally supposed to perform five times a day, preferably in congregation, whenever possible, the Qur'an mentions:

> Recite what is sent of the Book by inspiration to thee, and establish regular Prayer: for *Prayer restrains from shameful and unjust deeds* [*fahisha wa munkar*];... (*Surah al-ʿAnkabut*, 29:45)

Regrettably, despite the many mosques overflowing with Muslims, shameful and unjust deeds abound in Muslim societies. The torture and persecution of brides and wives over their dowry, the throwing of acid onto girls who do not either want to accept a proposal of marriage or to concede to extramarital sex, the practice of honor killings and so on are all prevalent in South Asia, the largest concentration of Muslims in the world. These are reminders of the disconnection between the

rituals and spirit of Islam. In many Muslim countries, women are the worst victims and are mostly devoid of legal protection. Victims of rape in Pakistan have been prosecuted and incarcerated for the crime of "adultery"[145] with, ironically, the connivance of the religious establishment who continue to provide support for the unjust law concerned and who oppose its repeal or reform.

Fasting (*sawm*) is another important pillar of Islam obligatory on all able-bodied Muslims, with certain exceptions, during the month of Ramadan. In Muslim-majority countries and Muslim communities elsewhere, the special affinity that Muslims have for this month is readily observable:

> O you who believe! Fasting is prescribed to you as it was prescribed to those before you, that you may (learn) *taqwa* (God-consciousness). (*Surah al-Baqarah*, 2:183)

The concept of *taqwa* (God-consciousness) is pivotal to Islam and the life of the Muslims because it is regarded as the prerequisite for benefiting from the divine guidance contained in the Qur'an:

> This is the Book; in it is guidance sure, without doubt, to those who are *muttaqun* (having *taqwa* – piety). (*Surah al-Baqarah*, 2:2)

This God-consciousness is not merely to build a closer relationship with God, but also to be conscious of one's attachment to humanity. Fasting assists those who eat regularly to understand and appreciate hunger, together with the suffering involved in case of poverty, destitution or deprivation. As the experience of fasting is expected to enhance an individual's moral self-restraint, it should also attune them to the suffering of their fellow human beings. However, although a great deal of generosity to feed the hungry is observed during this period, at the same time there is a lack of sensitivity to systematically address the problem of poverty and deprivation.

Islam emphasizes cleanliness (*taharah*) and the ablution before prayer is obligatory. Even a common or illiterate Muslim knows that *taharah* is Islamic:

> Abu Malik at-Ash'ari reported: The Messenger of Allah said: "Cleanliness is half of faith ..."[146]

One generally observes the meticulousness of practicing Muslims to attain ritual cleanliness. However, there is a significant disconnection between cleanliness and sanitation. In striving to maintain their personal hygiene many Muslims are oblivious to the public health hazards they create.

Another area where form overwhelms function is found in Islamic finance and banking. Gross misunderstanding and misinterpretation has led to the consideration that interest is prohibited (based on the Qur'anic prohibition of *riba*) and thus to the invention of products labeled as interest-free in name or form only. As Mahmoud El Gamal, Chair of Islamic Economics, Finance and Management at Rice University, observes:

> By attempting to replicate the substance of contemporary financial practice using premodern contract forms, Islamic finance has arguably failed to serve the objectives of Islamic Law (*maqasid al-Shari'a)*: Wherever the substance of contemporary financial practice is in accordance with Islamic Law, adherence to premodern contract forms (with or without modification) leads most often to avoidable efficiency losses, thus violating one of the main legal objectives that defined classical Islamic jurisprudence. Conversely, by focusing on the Islamicity of contract forms rather than substance (in part to justify efficiency losses), Islamic finance has often failed to serve the economic purpose for which certain premodern contract structures were codified in classical jurisprudence. ...
>
> 'Islamic' in 'Islamic finance' should relate to the social and economic ends of financial transactions, rather than the contract mechanics through which ends are achieved.[147]

Indeed, the intent behind the prohibition of *riba* is primarily related to *zulm* (injustice, exploitation):

> O you who believe! Fear Allah, and give up what remains of your demand for *riba*, if you are indeed believers.

> If you do it not, Take notice of war from Allah and His Messenger: But if you turn back, you shall have your capital sums: Deal not unjustly, and you shall not be dealt with unjustly. (*Surah al-Baqarah*, 2:278–279)

Islam's prohibition of *riba* is categorical. Therefore, it is only to be expected that Muslims would take the matter seriously. However, when the reason for the prohibition – injustice and exploitation – is delinked from the legal rulings then the whole exercise becomes one of pointless pretense: *zulm* continues to thrive albeit under a new guise, and the prohibition of *riba* only paid lip service, unsupported by real conviction or action. Thus, although the existing Islamic banking and finance movement has achieved remarkable success as a "prohibition-driven" industry[148] it is nevertheless delinked from the broader goals of development and poverty alleviation.[149]

13. *Embracing Life-Experience As Part of The Collective Learning Curve*

Contrary to the traditionalist understanding and approach, Islam is not intended to be an exclusively text-oriented belief. In attempting to understand this world God appears to want humans to benefit from the experience of life. He commands man to travel, see and learn about history. Rather than burying one's head in sacred books the faculties have been called upon to observe, think and reflect on the reality:

> Many were the Ways of Life that have passed away before you: travel through the earth, and see what was the end of those who rejected Truth. (*Surah Alʿ Imran*, 3:137)

Islam is not concerned with fostering compliant, mimicking minds. Rather it stresses observation, inquiry and thoughtfulness:

> Is it not a guidance for them (to observe) how many generations We destroyed before them, amid whose dwelling places they do walk? Lo! therein verily are portents! Will they not then heed? (*Surah al-Sajdah*, 32:26)

> Do they not reflect in their own minds? Not but for just ends and for a term appointed, did Allah create the heavens and the earth, and all between them: yet are there truly many among men who deny the meeting with their Lord (at the Resurrection)! (*Surah al-Rum*, 30:8)

> Do they not travel through the land, so that their hearts (and minds) may thus learn wisdom and their ears may thus learn to hear? Truly it is not their eyes that are blind, but their hearts which are in their breasts. (*Surah al-Hajj*, 22:46)

This list of values is by no means exhaustive. The values and principles above are based directly on the Qur'an. These should be among the essential parameters guiding the derivation and establishment of Islamic laws originating from non-Qur'anic sources. When sources other than the Qur'an, including the Hadith, conflict with these clear principles (as the deliverer of God's final message the life of the Prophet cannot contradict the Qur'an) these principles or values must be given precedence. Furthermore, laws and codes, as required, must not be approached in an atomistic manner as per the experience of legalism. Therefore, without compelling evidence to the contrary, any laws and codes derived via human agency must not violate or compromise Qur'anic principles.

A VALUE ORIENTED JURISPRUDENCE

The discourse that constitutes Islamic jurisprudence is already experiencing the call toward value-orientation. One of the most recent texts on the subject, written by Nyazee, is entitled "The Third Mode of Ijtihad: A Value Oriented Jurisprudence."[150] The author employs the values in the context of defining the *Maqasid al-Shari*ᶜ*ah* (higher objectives of the Shariᶜah). Accordingly, the *maqasid* are identified as the preservation and protection of the *Din* (faith; religion), life (*nafs*), family system (*nasl*), intellect (ᶜ*aql*), and wealth or property (*mal*).[151] The preservation and protection of these five categories is emphasized "under all circumstances," subject to where the *shari*ᶜ*ah* expressly stipulates otherwise.[152]

Of the five *maqasid* the latter four (life, family, intellect and property) are subservient to the first, *Din* (religion). Ghazali held a more nuanced view:

> Al-Ghazali says that the second purpose, which is the preservation and protection of life, may be considered by some to have a higher priority than *din*, because without life there would be no religion. This argument takes collective life into consideration, and in this sense it would also hold true for the intellect too, because the existence of *'aql* is considered by jurists to be a condition of *taklif* (legal obligation). He points out, however, that some provisions of the law clearly support the superiority of the interest of *din*.[153]

Interestingly, Nyazee compares these *maqasid* to secular values or goals arrived at through human reasoning:

> In its modern form the idea of natural law is inclined more towards a value oriented jurisprudence. ... In his [Dias'] view, the ultimate values that are identified by Western jurisprudence are: (1) national and social safety; (2) sanctity of the person; (3) sanctity of property; (4) social welfare; (5) equality; (6) consistency and fidelity to rules, principles, doctrine and traditions; (7) morality; (8) administrative convenience; and (9) international comity. A closer examination shows that most of these interests are identical to the five purposes of Islamic law or the *maqasid al-shari'ah*. What is interesting is that their use is also similar and so is the methodology.[154]

If the *maqasid al-shariʿah* are so close to the values derived from natural law and the application of human reason, then how much validity or weight can be attached to these *maqasid* based on the Shariʿah (a concept that is erroneously understood and projected as being divine in its entirety or immutable itself)?

The value-oriented perspective advocated here is somewhat more nuanced than that presented by Nyazee, this is because his treatment of the *maqasid* is as if they only represent values. However, value-orientation has to be more specific and detailed than this. A second problem is the traditional *maqasid* hierarchy which forces all other components (life, family, intellect and property) to be subservient to belief. In light

of the abuse of Islam experienced in modern times there is a potentially dangerous tendency that four of the *maqasid* will not be considered sacrosanct and that therefore this is a subject which needs revisiting. Thirdly, all three modes of ijtihad, including jurisprudence that is value-oriented, are based on a text-oriented approach, which constitutes both a serious problem and limitation that is discussed in greater detail in Chapter Six. Lastly, Nyazee's value-oriented approach does not also limit the source from which these values are derived to the Qur'an alone, which is the case made in this chapter.

Regardless, the shift of thought toward promotion of the value-orientation approach is both welcome and long overdue. Throughout this book the affects of legalism and literalism on Islamic law, resulting in a rift between the law and its *maqasid*, is examined in detail.

(VI) CONCLUSION

In order to be functional, every society requires regulation. However, laws must be based on certain essential values, in the case of Islam these are articulated in and must be derived directly from the Qur'an. It is theorized that if a value or principle is important enough God will have included these in the Qur'an, as explained by al-Shatibi:

> The Qur'an is the whole of the Shari'a, the support of religion, the fount of wisdom, the sign of Prophethood and the light of the eyes and the heart. There is no way to Allah except through it and there is no salvation by any other means than it. *You must not hold to anything that contradicts it*. None of this needs affirmation or deduction because it is known to the Deen of the Community. Since that is the case, whoever wants complete knowledge of the Shari'a and desires to perceive its aims and be joined to its adherents must necessarily take the Qur'an as his constant companion and make it his intimate, night and day, in both investigation and action.[155]

Moreover, the existence of laws and a legal framework must not lead to the occurrence of legalism. Although the Shari^{c}ah is erroneously equated with laws, it is important to understand and acknowledge that,

except in the limited case of those injunctions clearly specified in the Qur'an and the *hudud* (penal acts), the Shariʿah is essentially a human construct. Therefore, in general, it is incorrect to label, understand or regard the Shariʿah as "eternal," "divine" or "immutable." The Qur'an, Prophetic legacy and practice of – the recognition of the need for – continuous ijtihad contradict this notion.

If the Shariʿah is understood as constituting the Divine Will "as it exists in the mind [meaning intention] of God" then it is divine, immutable and infallible. However, in this case, the expression "Shariʿah" cannot be thought of as synonymous with fiqh or Islamic law. Whatever the definition then it is clear that one cannot have it both ways. In fact, the proper understanding of the term, as argued in this chapter, is "divine will" instead of laws and codes, which are primarily human constructs – even if these are informed by or rooted in a divine source such as the Qur'an. Reducing the Shariʿah to the level of law or code is therefore simply untenable. It not only misrepresents Islam, but also serves as the impetus for legalistic tendencies that have now become entrenched, robbing Islam of the vitality and dynamism to guide the world and solve its problems in the present age.

Ultimately, proper understanding of the Shariʿah, from the Islamic perspective, is important not merely for theological reasons but because it is necessary if Muslims are to restore and reclaim the dynamism that enabled them, under the leadership and guidance of the Prophet, to lay the foundation of a great community leading to a vibrant society and civilization. Through self-critical discourse, creative and constructive intellectual rejuvenation, moral and religious clarity that is simple as well as unambiguous, a dynamic problem-solving and value oriented approach rooted in the Qur'an, and inspired and guided by the Prophetic legacy, will allow Muslims to be able to better fulfill their duty to themselves, to humanity and above all to their benevolent Creator.

CHAPTER 3

Islamic Law and the Use and Abuse of Hadith

THE Qur'an is the fountain source of Islam. As Muslims have no dispute about the Qur'an's constitution and accept it as the only preserved and direct revelation from Allah essential principles, values and norms must be, and indeed are, derived from its text. Also originated from the text are a few – just a bare few – legal matters. With regards to the former, unless the importance of a value-oriented approach is understood (as outlined in the previous chapter) and given intrinsic worth tempering the excessive resort to legalism which currently prevails we are in danger of losing sight of the deeper requirements of our faith as set out in the Qur'an.

The second source of Islam is the Sunnah which delineates the Prophet's way of life, the example he set before us in his attitudes, actions and sayings, and which forms the framework of the faith. One important classification of the Sunnah is Legal and non-Legal Sunnah – where legal means sunnah pertaining to those aspects of life and practice that are legally enforceable and non-legal means those aspects that are not legally enforceable.. So important is the Sunnah in fact in revealing the personal guidance of the Prophet and his living example of the Qur'an that although there exists broad agreement over its validity as an illustration of the message of the Qur'an embodied in the Prophetic example, it is nevertheless vital that the issue of the authenticity of *ahadith*, which comprise a key source of the Sunnah, be addressed. This is the subject of this chapter. Discussion will focus specifically on two areas a) those *ahadith* that are unmistakably from the

Prophet applicable to all time and space and b) those *ahadith* for which there is no consensus over their authenticity and/or of the validity of each and every narration. Nor is there consensus over the exact theoretical relationship between the Qur'an and Hadith as Islam's primary sources of legislation.

This is a difficult subject. At one extreme lies the orthodox position, which holds that the Qur'an and Hadith are two equal primary sources of Islamic guidance and at the other extreme are those who falsely reason that the Hadith are not relevant to modern times or who reject them altogether. In reality however, we cannot ever claim that the *ahadith* hold the same undisputed authenticity of the Qur'an which is why the science of Hadith criticism was developed in the first place, to distinguish between the false and the true. And it is in this spirit and following in the footsteps of Islam's best scholarly tradition that I address certain issues concerning the science of Hadith in this chapter. For as I mention in chapter two although Muslim scholars deserve deep appreciation not only for their painstaking work, but also their invaluable contribution towards preserving the Hadith literature to the best of their ability, we still need to face the question that as a body of information, the Hadith evinces some problems with the way in which it was collected and compiled, and to insulate Hadith from examination allows their abuse and misuse to continue by those profiting from the faithful's ignorance of it or applying it in a manner as if it is co-equal with the Qur'an.

The issues addressed in this chapter therefore are in no way meant to undermine confidence in Hadith for Hadith scholars have addressed many of the relevant concerns by identifying those narrations that are presumed authentic (*sahih*) from the rest. Despite residual problems, this body is still considered an indispensable and mostly reliable foundational source of Islam.The body of collected traditions is precious and an indispensable source in gaining detailed knowledge of the actions and speech of the Prophet, as observed and attested by his noble Companions and that the approach that aims to employ the Qur'an exclusively in the definition of things Islamic is fundamentally wrong and misguided. Having said this it is also important to be aware of rigid imitation, freezing our thought in time, and appreciate that the science

of Hadith criticism and authentication is an ongoing process and a more discerning approach needs to be adopted. The point being to free " the *shari'ah* of Islam from all the irrelevances and burdensome accretions that have grown up around it in the course of centuries of decline and to establish it, once again, as a practical, living guidance towards an Islamic way of life,"[1] one in my view which follows a value-oriented approach.

Some Hadith collections are deemed to be generally authentic (*sahih*), while other collections are recognized as sources of additional authentic Hadith mixed with weak (*da'if)* or even spurious (*mawdu'*) narrations. The vast and comprehensive body of Islamic law (fiqh) rests critically on the Hadith literature that explains the general and absolute terms of the Qur'an. Islamic scholars, including the Hadith experts, have gone to great lengths to defend the sanctity of the Hadith, utilizing it not just to expound Islamic knowledge but also to formulate Islamic codes and laws, treating Islam as a "complete way of life."

In the preface to his book on the subject, Kazi illustrates this tendency by stating that "all the sayings, sermons, and utterances of the Prophet were… divinely inspired. ... *all of the actions and deeds of the Prophet were also divinely inspired*."[2] His articulation represents the traditionalist viewpoint:

> The sunnah and *ahadith* are not to be taken as the wise sayings of sages and philosophers or the verdicts of rulers and leaders. One should believe with full conviction that the words and actions of the Prophet represent the will of Allah, and thus one has to follow and obey them in each and every circumstance of life.[3]

This traditionalist view, attributing some level of 'divinity' to the Hadith, is not uncommon in Islamic works. For instance, Alauya writes:

> The Prophetic Tradition or Sunna is an inspiration from Allah, meaning, its language (letter) is from the Prophet and the meaning is from Allah (i.e., Divine in content alone). ... [T]here are two kinds of revelation from Allah. ... The Qur'anic verse is of the second kind and the prophetic Sunna is of the first kind.[4]

> The only difference between the ordinary expressions of the Prophet and these revelations to him from Allah consists in the fact that, whereas the former are Divine in content alone, the latter are Divine in form also.[5]

> All the utterances and deeds of the Prophet are thus divinely inspired and in them alone can we find the true meaning and real significance of the will of Allah.[6]

There are several unfortunate implications that transpire from the attribution of divinity to the Hadith. Firstly, the authoritativeness of the Qur'an and Hadith are placed on a par with each other:

> The Shari'a values of the prophetic traditions are like that of the Qur'anic Shari'a values in the matter of demanding obedience ...[7]

Secondly, if, concerning the same issue, a hadith occurs subsequent to the Qur'anic revelation chronologically, then, according to the traditional view, it abrogates the Qur'anic verse, which is also at odds with the opinion of the vast majority of scholars. Imam Shafi'i, for example, wrote against abrogating any verse of the Qur'an with any Hadith, whatever its degree of authenticity. However, some scholars held the following view:[8]

> Indeed, when the prophetic Sunnah is later in point of time than a verse of the Qur'an, the former supersedes the latter.[9]

As explained in Chapter Five, there is no Qur'anic verse abrogating another Qur'anic verse, let alone abrogation by the Hadith. Furthermore, as demonstrated in this chapter, the attribution of divinity to the Hadith is generally without merit.

At the other extreme are those who reject the Hadith literature altogether and claim that the Qur'an should be the only source of information and legislation. They contend that the Prophet did not ask or require that his words and actions be preserved as a separate body of knowledge. Indeed, the collection and preservation of the Prophetic narrations is cited – by them – to have begun more than a century later, which initself is open to dispute, and that despite the best intentions

and efforts the Hadith literature became mixed so that it consisted of both authentic and inauthentic reports. Additionally, they say that those collections generally regarded as being *sahih* (strong or authentic) are also known to contain non-*sahih* Hadith, and that Hadith experts even differ over many of the hadiths that are considered *sahih*; there being significant variation over the same event or circumstances within the Hadith in many cases, as well as a number of simply contradictory reports. It is little wonder then that, in the name of formulating codes and laws, a corpus of legislation, emanating from unacceptable dogmas and taboos, crept into Islam based on this literature. While the Qur'an is held to be just and egalitarian, in contrast discriminatory or unjust (sometimes harsh or indefensible) laws, codes or customs have been accommodated or validated by Islamic scholars and jurists based on the Hadith. Rejecters of the Hadith literature therefore accept the Qur'an as the only divine source of guidance dismissing the agency of the Hadith literature in its entirety. They do so ignoring ironically the Qur'an itself:

> Allah did confer a great favour on the believers when He sent among them an apostle from among themselves rehearsing unto them the signs of Allah, sanctifying them in scripture and wisdom while, before that, they had been in manifest error. (*Surah Al ʿImran*, 3:164)

> And We have sent down unto you the Message that you may explain clearly to men what is sent for them. (*Surah al-Nahl*, 16:44)

> For he commands them what is just and forbids them what is evil; he allows them as lawful what is good and pure and prohibits them from what is bad and impure. He releases them from their heavy burdens and from the yokes that are upon them. (*Surah al-Aʿraf*, 7:157)

Both extreme positions suffer from serious problems and the truth lies somewhere in between. Indeed, while the essential position of the movement against Hadith is untenable and certainly unacceptable, it has been precipitated in part as a reaction to the extreme claims and dogmas of the traditionalist position.

While examination of each antipodal position might be of some polemical interest the crux of the issue revolves around the fact that the Hadith constitutes the detailed basis for most Islamic laws and codes even though some of these are in reality contrary to the intent and spirit of the Qur'an and Islam's fundamental commitment to justice and fairness. The issue does not also merely involve the authenticity of the Hadith or the Sunnah, but also how the Hadith and Sunnah are applied toward the formulation of laws and codes. As AbuSulayman explains:

> The problem of the authenticity of the *Sunnah* is basically an expression and reflection of the unhappiness on the part of Muslims with the centuries-old jurisprudence.[10]

For the sake of simplicity and clarity, the terms Hadith and Sunnah are used here interchangeably. The Sunnah should be understood as meaning "a normative, model behavior and an exemplary conduct, and that in its primary sense it means 'the setting up of an example.'"[11] However, although the Sunnah is commonly identified with the normative conduct of the Prophet, there is wide divergence among Muslims over what the Sunnah means pertaining to any particular matter. Indeed, due to the *ahl al-ra'y* movement (people of considered or rational opinion) the Sunnah eventually became a regionally identified practice:

> … rational thinking produced an immense wealth of legal, religious, and moral ideas during the first century and a half approximately. But with all that wealth, the product of this activity became rather chaotic, i.e., the 'Sunnah' of different regions – Hijaz, Iraq, Egypt, etc., – became divergent on almost every issue of detail.[12]

This chaotic condition persisted until the traditionalist position (*Ahl al-hadith*) led by Shafiʿi held sway. As Shafiʿi established the pivotal role of the Hadith in authenticating the Sunnah this gradually became the new orthodoxy.[13] Therefore, the focus of this chapter concerns the Hadith, in particular, as opposed to the Sunnah.

Before exploring the connection between law and Hadith some pertinent issues concerning the Hadith require broaching. In particular, there are some generally misunderstood positions that ordinary Muslims might not be familiar with because the Hadith literature, especially the science of Hadith (*ʿilm usul al-hadith*), is a highly technical body of knowledge about which the traditionalist position does not tolerate any observation, argument or evidence viewing it as a form of attack which undermines the Hadith literature in general.

(I) COMMON MYTHS ABOUT THE HADITH

1. *If a Hadith Quotes the Prophet, This Indicates Exactly What the Prophet Had Said*

Unfortunately, this sentiment is not necessarily true. The process of quoting involves repeating the exact words of another with the acknowledgement of the source. Thus, when quoting someone this is usually recognized as involving a faithful rendition of the words uttered by the person concerned. Readers may form the justifiable impression that the *exact word* of the Prophet is provided in a hadith when someone reports that "the Prophet said…" or states "I heard the Prophet saying…" without clarifying that the passage concerned is paraphrased. Frequently this is not the case however.

In his book, *What is Riba?*, Suhail discusses this important point, which is not often known or understood by many Muslims. Scholars do not usually educate the wider community about this aspect of the Hadith literature:

> Most of the narrations are derivations [i.e., not quotes of actual words], that is, the actual words of the Holy Prophet (pbuh) have not been quoted in the narration and whatever the narrator understood to be the meaning of the Prophet's (pbuh) words, according to his capacity and capability, he narrated with the best of intention as the saying of the Holy Prophet (pbuh). Now, everyone knows that besides words even the slightest change of delivery can induce great difference in the meaning.[14]

In this context, it becomes important to understand the distinction between the *mutawatir* and *ahad* (solitary) categories of Hadith, which are defined below. A *mutawatir* narration means "continuously recurrent" or "a report by an indefinite number of people related in such a way to preclude the possibility of their agreement to perpetuate a lie."[15] There is no complete agreement on the required minimum number of transmissions that qualify as *mutawatir*.

At this juncture, it is pertinent to ponder where the *sahih* (authentic, as per the criteria applied by the Hadith scholars) category fits into the *mutawatir-ahad* classification. A hadith cannot be classed as *mutawatir* without also being *sahih*. However, the category encompassing solitary reports is quite distinct from *mutawatir* narrations. Any non-*mutawatir* hadith is by definition *ahad* (solitary). Solitary narrations themselves do not necessarily imply the existence of a single chain of transmission. More than one chain, as long as this does not constitute a *mutawatir* (numerous) report, can occur. *Ahad* Hadith are additionally classified into further broad categories consisting of *sahih*, *hasan*, *daᶜif*, etc.

Two classes of *mutawatir* narration exist: *mutawatir bi al-lafz* (where all reports must be identical in terms of the *exact wording* of the hadith uttered by the Prophet himself). For example, the hadith which reads: 'Whoever lies about me deliberately must prepare himself for a place in Hell-fire.'[16] – this type of hadith is extremely rare; and *mutawatir bi al-maᶜna*, where there is agreement in respect of the concept or meaning of the utterance rather than agreement about the exact wording. Most *mutawatir* hadiths belong to this latter category even though many are narrated as if quoting the Prophet verbatim. This type of transmission is also known as "conceptual transmission."[17]

The following is an example of variation that occurs in the Hadith literature and does not involve a direct quote from the Prophet:

> This hadith has been narrated from Jarir on the authority of A'mash with the same chain of transmitters and he said (*these words with a little bit of variation from the previous hadith*): When (fasting) in Ramadan was (made) obligatory, he abandoned it (the practice of observing fast on Ashura).[18]

Now consider the next example, which demonstrates a similar variation in narration, again without quoting the Prophet directly:

> This hadith has been narrated by Sulaiman al-Taimi with the same chain of transmitters (but *with a slight variation of words*) that he (the Holy Prophet) said: The dawn is not like it as it is said; he then gathered his fingers and lowered them. But he said, it is like this (and he placed the index finger upon the other one and spread his hand).[19]

The two hadiths above originate from *Sahih Muslim*. There are hadiths in this collection, as well as in the other respective collections, which do not exhibit variation within the collection or even across other collections. It is notable that not every Hadith collection points out the variation as does *Sahih Muslim*. Regardless of the level of notification of variation reported in the case of authentic hadiths, these still may not constitute *mutawatir* narrations yielding certainty of knowledge (the issue of certainty of knowledge will be discussed later in this chapter in greater detail).

Having said this it should also be pointed out that for those who lived with the Prophet, who took his every word with utmost seriousness, ordering their lives by them, it is unlikely that they would treat his words in an offhand manner but rather just as they memorized every letter of the Qur'an, would try to preserve the Prophet's words in their memory to the best of their ability. Clearly, variations in a narration (and such variations are all too common) do not allow the exact words used by the Prophet to be confirmed, which is a serious problem. This is especially important in the case of the Arabic language where even a slight variation in wording (and sometimes even the lettering of a passage) can lead to divergent meanings:

> [Shafiʿi] replied: *A word might be omitted from the tradition and thus alter its meaning; or a word might be pronounced differently from the way it was pronounced by the transmitter, thus altering the meaning of the tradition, even though he who pronounced it did not intend to do so*. If he who transmits a tradition is ignorant of its meaning, he does not understand the tradition, and we do not accept it. [For] if he transmits what he does not understand, he is of those who do not transmit the tradition word for word; and he seeks to

> transmit the meaning of the tradition, but he does not understand the meaning at all.[20]

Should the conclusion be drawn from Shafi'i's statement that transmission is unacceptable unless accomplished word for word? Certainly not, for the simple reason that the Imam does not apply this standard to *sahih* Hadith himself. Why is this so? Apparently, it is because Shafi'i does not apply this standard to authenticate a hadith the application of which would be binding as per Islamic fiqh (law).

2. *Sahih Collections Contain Hadith That are Indisputable*

Sahih (authentic) reports can be found in any Hadith collection (except those specifically compiled from inauthentic hadith for comparison). Six Hadith collections are regarded as the most authentic or "canonical."[21] These are collectively known as the *al-Sihah al-Sittah* and include: *Sahih al-Bukhari*, *Sahih Muslim*, *Sunan Abu Dawud*, *Jami' al-Tirmidhi*, *Sunan al-Nasa'i*, and *Sunan Ibn Majah*.[22]

Among the six canonical collections *Sahih al-Bukhari* and *Sahih Muslim* are held in the highest esteem. Indeed, al-Bukhari is regarded by many as the most authentic and authoritative, and, thus, influential book in Islam after the Qur'an:

> It was thus that the *sahih*, the work of a great traditionist who combined a vast knowledge of traditions and allied subjects with scrupulous piety, strict exactitude, the painstaking accuracy of an expert editor, and the legal acumen of an astute jurist, rapidly attracted the attention of the whole Muslim community, and became accepted as an authority next only to the Qur'an.[23]

However, highly-skilled experts of Hadith confirm that even within al-Bukhari's collection, not all the reports are beyond dispute. Many scholars criticized Bukhari's work. The criticism concerns about 80 narrators and some 110 hadiths.[24] Acknowledging the preeminence of al-Bukhari, Siddiqi points out:

> It would be a mistake, however, to suppose that the *sahih* is free of defects, or that the Muslim scholars have failed to criticise it in certain respects.

> Thus it is generally accepted that like other traditionists, al-Bukhari confines his criticism to the narrators of traditions, and their reliability, and *pays little attention to the probability or possibility of the truth of the actual material reported by them*. In estimating the reliability of the narrators, his judgment has in certain cases been erroneous, and the Muslim traditionists have not failed to point this out.[25]

While the compilers of all six major collections (*al-sihah al-sittah*) focused their attention to the chain of narration and were not concerned with textual (*matn*) analysis, we find that even in the narration (*sanad*) they provided little and often no criteria for their selection. Later scholars attempted to identify the criteria employed in a manner akin to "reverse engineering" (the process of determining how something is constructed by examining only the finished product). Maqdisi was a noted twelfth century (CE) scholar and contemporary of Ibn Salah. He wrote *Risalat al-Hafiz Mohammad ibn Tahir al-Maqdisi fi Shurut Kutub al-A'immah al-Sittah* as a study of the authentication criteria used in the *al-sihah al-sittah*. Muhammad ibn ʿUthman al-Hazimi was another scholar (d. 1188 CE) who probed into determining the criteria used by the Hadith compilers in his book *Shurut al-A'immah al-Khamsah*:[26]

> Because *al-Bukhari nowhere mentions what canons of criticism he applied to the traditions to test their genuineness*, or tells us why he compiled the book, many later scholars have tried to *infer* these things from the text itself. Al-Hazimi, in his *Shurut al-A'imma*, Al-Iraqi in his *Alfiyya*, Al-'Ayni and Al-Qastallani in their introductions to the commentaries on the *Sahih*, and many other writers on the Hadith sciences, including Ibn Al-Salah, have tried to deduce Bukhari's principles from the material he presents.[27]

For Bukhari and Muslim "convinced that establishing the authenticity of a hadith's chain of narrators ensured authenticity of its text, their major focus was therefore squarely on authentication of Hadith through a rigorous examination of the chain of narrators."[28]

The most faithful identification and verification of the authenticity of a hadith still does not eliminate the main problem to hand: that even *sahih* Hadith are subject to various interpretations and human

interpretations are fallible – a reality that must never be forgotten. In an exchange between ʿAbd al-Rahman al-Awzaʿi (d. 774 CE), the founder of an extinct school of fiqh, and Abu Yusuf (d. 798 CE), one of the two immediate disciples of Abu Hanifah, Abu Yusuf responds to al-Awzaʿi as follows:

> It has come down to us what al-Awza'i said. But the Hadith of the Prophet has many meanings and has different facets and it requires explanations, which no one comprehends and sees except the one whom God helps in understanding it.[29]

It is important to note that these two pioneering scholars did not discuss the authenticity of Hadith, rather they emphasized their own interpretation and understanding of a specific hadith. Al-Qaradawi's account of a number of hadiths in this context then is an illuminating example:

1. 'Any woman who wears a gold necklace will be made to wear a similar one [made] of fire on the Day of Judgment. And any women who wear gold earrings will have a similar one [made of fire] on the Day of Judgment.'

2. 'Whoever desires his beloved to wear a ring [made] of fire [on the Day of Judgment], let him give him [her] [to wear] a gold ring. And whoever desires his beloved to wear a necklace [made] of fire [on the Day of Judgment], let him give him [her] [to wear] a gold necklace. And whoever desires his beloved to wear a bracelet [made] of fire [on the Day of Judgment], let him give him [her] [to wear] a gold bracelet. But you can do whatever you please with silver.'

3. It is also related by Thawban that the Prophet warned his daughter Fatimah for wearing a gold chain. In response, she sold it, bought a slave with the money, and set him free. When the Prophet was told of this, he said: 'Alhamdulillah, he who rescued Fatimah from the Fire.'

Jurists, however, hold widely divergent opinions about these *ahadith* (plural of hadith):

Some have examined their *isnad* and finding them weak rejected them and considered them insufficient for prohibition which requires clear-cut evidence and careful investigation, especially with respect to matters of general concern and which Muslims have generally accepted.

Some have agreed that the *isnad* is correct but that the *ahadith* have been revoked because other evidence in other sources has permitted women to adorn themselves with gold. Al Bayhaqi and others have reported the consensus on this matter which has been accepted in fiqh and became a standard practice.

Some considered the *ahadith* applicable to those who have not given zakah on the gold they have, basing their opinion on other *ahadith* which have not, themselves, escaped criticism. Furthermore, zakah on women's jewelry is a subject of disagreement among the different *madhahib*.

Some argue that these *ahadith* seek to warn women who vainly adorn themselves with gold, deliberately intending to draw attention to their wealth. Al-Nisa'i also reported some *ahadith* which are relevant to this issue under the title: '*Bab al-Karahiyyah li al-Nisa' fi Izhar Hiliy al-Dhahab*.' Other jurists say that they are related only to excessive adornment out of vanity or pride.

In our own times, Shaikh Nasir al-Din al-Albani has come out with an opinion, different from the consensus on permitting women to adorn themselves with gold, which has been accepted by all *madhahib* for the last fourteen centuries. He not only believes that the *isnad* of these *ahadith* is authentic, but they have not been revoked. So, he believes, the *ahadith* prohibit gold rings and earrings.[30]

So, is it to be surmised that the *ahadith* cited above are *sahih* or not? For those who consider them *sahih*, is it true that the narrations in question have been abrogated? Or are they merely an exhortation concerning vain women desiring to display their charms? Do these *ahadith* instead apply to those who do not give zakah (alms) on their jewelry? There is no agreement on any of these aspects. Yet Shaykh al-Qaradawi

a widely known and respected scholar, assumes that there is consensus on the issue, which is not the case. This demonstrates the importance of our circumspection in presenting and accepting any law as Islamic in terms of being authoritative.

3. *There is No Contradiction Between Any Narrations of Hadith*
Bold claims emanate from the traditionalists in defense of the sanctity of the Hadith literature. They maintain that the hadith – especially the *sahih* – has no contradictions, it being asserted that every anomaly involving *sahih* Hadith can be explained. Since al-Bukhari is held in the highest regard there is need only to discuss some examples taken from this collection alone.

(a) Mohammad Akram Khan (a well-known Indian scholar; d. 1969)[31] cites a hadith from al-Bukhari:

> Narrated Jabir ibn ᶜAbdullah:
> I was present with my two maternal uncles at Al-ᶜAqabah (where the pledge of allegiance was given). Ibn 'Uyaina said, "One of the two was Al-Bara' bin Ma'rur."[32]

> The readers will be presented with the *Bay'ah* (allegiance) of ᶜAqabah at the appropriate place. There is a narration about this matter from Jabir Ibn ᶜAbdullah in Bukhari. According to that Hadith, Jabir was present at that event of *Bay'ah* along with his maternal uncle Bara' ibn Maᶜrur. (Bukhari, 15–464), However, it has been definitively established that Bara' is not the maternal uncle of Jabir. Anisah, Jabir's mother, had only two brothers: Thaᶜlabah and Amru.' They were present during the second ᶜAqabah [Fath al-Bari, *ibid.*]. So there is something definitely wrong in this hadith, and some kind of *Ta'wil* (interpretive artifice) would be necessary to make it right.

After pointing out the discrepancy Khan leaves room for potential interpretative explanations, although he has identified many such unsuccessful attempts to do so in the past. Can the discrepancy in the above hadith be explained? Perhaps, but there exist *ahadith* in al-Bukhari that simply offer no satisfactory explanation at all.

(b) Consider the following hadith, also offered as an example by Khan:

> Anas, Ayesha and Ibn ʿAbbas are narrating: "Allah sent him (as an Apostle) at the age of forty (and after that) he stayed for ten years in Mecca, and for ten more years in Medina."[33]

It is an historical fact that after attaining Prophethood at the age of forty, the Prophet Muhammad stayed in Makkah for 13 not 10 years. However, the hadith in question states that he stayed in Makkah for 10 years. Interestingly, this discrepancy does not occur between one hadith in al-Bukhari and another in one of the remaining sources. Rather, the anomaly lies within al-Bukhari collection itself. In al-Bukhari, volume 5, hadith no. 190 and hadith no. 242, it is reported that the Prophet lived in Makkah for 13 years:

> Narrated Ibn ʿAbbas:
> Allah's Apostle was inspired Divinely at the age of forty. Then he stayed in Mecca for **thirteen** years, and then was ordered to migrate, and he migrated to Medina and stayed there for ten years and then died.

Furthermore, in *Sahih Muslim*, another collection of Hadith rivaling that of *Sahih al-Bukhari*, reports that the stay in Mecca lasted **fifteen** years instead.[34]

So, this begs the question did the Prophet remain in Makkah (after assuming the mantle of Prophethood at the age of forty) for **ten, thirteen or fifteen** years? According to the reports, the position is obviously irreconcilable. In light of these discrepancies, it is pertinent to raise the issue of the scope of the problem for other narrations consisting of reports in a form of wording conveying concepts and understanding not relayed in the exact words of the Prophet, but which are paraphrased instead by the narrators concerned.

(c) Another example of similar contradictions comprises the identity of the final verse revealed in the Qur'an:

> Narrated Ibn ʿAbbas:
> The last Verse (in the Qur'an) revealed to the Prophet was the Verse dealing with usury (i.e. *Riba*).[35]

> Narrated al-Bara':
> The last *Surah* that was revealed was Bara'a, and the last Verse that was revealed was: "They ask you for a legal verdict, Say: Allah directs (thus) about those who leave no descendants or ascendants as heirs." (4.176)[36]

The same is also mentioned in *Sahih Muslim*:

> Al-Bara' (Allah be pleased with him) reported that the last verse revealed in the Holy Qur'an is: "They ask thee for a religious verdict; say: Allah gives you a religious verdict about Kalala (the person who has neither parents nor children)."[37]

Verse 4:176 reads as follows:

> They ask you for a legal decision. Say: Allah directs (thus) about those who leave no descendants or ascendants as heirs. If it is a man that dies, leaving a sister but no child, she shall have half the inheritance: If (such a deceased was) a woman, who left no child, her brother takes her inheritance: If there are two sisters, they shall have two-thirds of the inheritance (between them): if there are brothers and sisters, (they share), the male having twice the share of the female. Thus does Allah make clear to you (His law), lest you err. And Allah has knowledge of all things.

There appears to be no relationship between this Qur'anic verse and the verse dealing with *riba* (usury) mentioned in the hadith narrated by Ibn ʿAbbas as the last one to be revealed.[38]

(d) There are many examples of hadith, including those involving the subject of *riba*, that are contradictory:

> Narrated Umar bin Al-Khattab:
> Allah's Apostle said, "The bartering of gold for silver is *Riba* (usury), ***except if it is from hand-to-hand and equal in amount***, and wheat grain for

> wheat grain is usury except if it is from hand-to-hand and equal in amount, and dates for dates is usury except if it is from hand-to-hand and equal in amount, and barley for barley is usury except if it is from hand-to-hand and equal in amount."[39]

According to the above hadith, exchanges involving gold for silver involve *riba* except when they are hand-to-hand (or spot/cash) transactions **and** equal in amount. The following hadith from al-Bukhari, however, indicates that a different measure applies:

> Narrated Abdur-Rahman bin Abu Bakra:
> That his father said, "The Prophet forbade the selling of gold for gold and silver for silver ***except if they are equivalent in weight***, and allowed us to sell gold for silver and vice versa as we wished."[40]

According to this hadith, exchanges involving gold for silver are *riba* except if they are equal in weight. There is no mention of the spot/cash/hand-to-hand restriction in this case. Now consider the following hadith from al-Bukhari:

> Yahya related to me from Malik from Ibn Shihab from Malik ibn Aus ibn al-Hadathan an-Nasri that one time he asked to exchange 100 dinars. He said, "Talha ibn Ubaydullah called me over and we made a mutual agreement that he would make an exchange for me. He took the gold and turned it about in his hand, and then said, 'I cannot do it until my treasurer brings the money to me from al-Ghaba.' Umar ibn al-Khattab was listening and Umar said, 'By Allah! Do not leave him until you have taken it from him!' Then he said, 'The Messenger of Allah said, "*Gold for silver is usury* ***except hand-to-hand***. Wheat for wheat is usury except hand-to-hand. Dates for dates is usury except hand-to-hand. Barley for barley is usury except hand to hand."'"[41]

Exchanges involving gold for silver constitute *riba* except when these are spot/cash transactions in this hadith. No mention of equivalence in weight as a restriction is made in this case. Reviewing the following hadith from al-Bukhari, however, reveals a quite different situation:

> Narrated Abu Bakra:
> Allah's Apostle said, "Don't sell gold for gold unless equal in weight, nor silver for silver unless equal in weight, but *you could sell gold for silver or silver for gold* ***as you like***."[42]

In this report, exchanges involving gold for silver or silver for gold bear no such restrictions whatsoever. Not so, according to the following hadith recorded in *Sahih Muslim*:

> Ubada b. Al-Samit (Allah be pleased with him) reported Allah's Messenger (pbuh) as saying: Gold is to be paid for by gold, silver by silver, wheat by wheat, barley by barley, dates by dates, and salt by salt, like for like and equal for equal, payment being made hand to hand. ***If these classes differ, then sell as you wish if payment is made hand-to-hand***.[43]

In this case, the hadith stipulates that even when the classes differ – gold for silver or silver for gold – the exchange cannot be transacted freely. The deal still has to occur according to a hand-to-hand (spot/cash) transaction. Which restriction applies and is therefore valid remains unclear. Even the use of *naskh* (abrogation) to clarify the argument is not adequate to address all the anomalies here.

Such variation in the *ahadith* relating to *riba* is relevant not only in terms of illustrating the serious problem ascertaining the precise speech and orders of the Prophet, but also in deducing rules to address the practical issues of our time. For example, the field of Islamic finance and banking, which is based on the *riba*-interest equation (presuming a simplistic and blanket equivalence between interest and *riba*), draws primarily on the Hadith literature for its details. The pertinent *ahadith* cited above are related to *riba al-fadl* (the type of *riba* relating to trade or barter). The Qur'an categorically and explicitly prohibits *riba*. However, a legalistic tendency has crept in inducing jurists to gradually broaden the scope of the prohibited form of *riba* to the extent that applying that prohibition in modern times has led to Islamic finance that is Islamic in form only, but not in substance.[44]

Yielding to legalism, Islamic finance has become a "prohibition-driven" industry, primarily mimicking conventional products and liberally employing the terms "Islamic," "halal" or "Shari'ah-compliant"

wherever deemed expedient. Indeed, the entire enterprise has become delinked from the broader economic goals of Islam (alleviation of poverty, increased employment, stability of the price level, economic growth, more equitable distribution of income, etc.).

While claiming that Islamic finance is superior, because it is based on the equitable sharing of both profit and loss as well as risk, the industry is primarily engaged in *murabahah* (mark-up type, virtually risk-free) transactions, virtually shunning or marginalizing profit-loss sharing PLS-type products.

Tellingly, one of the leading jurists, who is also much sought after by the Islamic financial institutions and a strong exponent of the *riba*-interest equation, Muhammad Taqi Usmani laments:

> This [i.e., Islamic] philosophy cannot be translated into reality unless the use of *musharakah* is expanded by the Islamic banks. It is true that there are practical problems in using the *musharakah* as a mode of financing, especially in the present atmosphere where the Islamic banks are working in isolation, and mostly without the support of their respective governments. The fact, however, remains that the Islamic banks should have advanced towards *musharakah* in gradual phases and should have increased the size of *musharakah* financing. Unfortunately, the Islamic banks have overlooked this basic requirement of Islamic banking and *there are no visible efforts to progress towards this transaction even in a gradual manner, even on a selective basis. … [T]he basic philosophy of Islamic banking seems to be totally neglected*.[45]

While we might be tempted to blame greedy bankers, the unfortunate reality is that the products and services being marketed are now carrying the stamp of approval of the Shari^{c}ah scholars, and the approach of these scholars in approving these products as structured is related to the way *riba*-related prohibitions are applied legalistically without paying attention to the substance.

(e) One more illustration of the variations and contradictions to be found in the Hadith literature occurs in *Sahih Muslim*. It involves the book of business transactions (*Kitab al-buyu^{c}*), specifically the subject of: "The Selling of the Camel and Stipulation of Riding on it." Several

ahadith occur on the subject, requiring careful and thorough examination in order to fully appreciate the problems involved.

In studying the narrations concerned, information involving the following matters needs to be considered, as it is instructive.

(i) Was the price specified and agreed upon?
(ii) Who set the initial price?
(iii) Was Jabir reluctant to sell?
(iv) Did Jabir stipulate, or the Prophet offer, the return ride?
(v) How much did the Prophet pay?
(vi) Did the Prophet return the camel with the price or not?

A summary of the variations and divergences is presented at the end of this set of hadith:

> Jabir b. ʿAbdullah reported that he was traveling on his camel which had grown jaded, and he decided to let it off. When Allah's Apostle met him and prayed for him and struck it, so it trotted as it had never trotted before. He said: "Sell it to me for an 'uqiya." I said: "No." He again said: "Sell it to me." So I sold it to him for ***an 'uqiya***, but ***made the stipulation*** that I should be allowed to ride back to my family. Then when I came to (my place) I took the camel to him and he paid me its price in ready money. I then went back and he sent (someone) behind me (and as I came) he said: "Do you see that I asked you to reduce the price for buying your camel. Take your camel and your coins; these are yours."[46]

> Jabir b. ʿAbdullah reported: I went on an expedition with Allah's Messenger. He overtook me and I was on a water-carrying camel who had grown tired and did not walk (trot). He (the Holy Prophet) said to me: "What is the matter with your camel?" I said: "It is sick." He (the Holy Prophet) stepped behind and drove it and prayed for it, and then it always moved ahead of the other camels. He (then) said: "How do you find your camel?" I said: "It is, by the grace of your prayer, all right." He said: "Would you sell this (camel) to me?" I felt shy (to say to him, "No") as we had no other camel for carrying water, but (later on) I said: "Yes," and I sold it to him on the condition that (I would be permitted) to ride it

until I reached Madina. I said to him: "Allah's Messenger, I am newly married," so I asked his permission (to go ahead of the caravan). He permitted me, and I reached Medina well in advance of the other people, until I reached my destination. There my maternal uncle met me and asked me about the camel, and I told him what I had done with regard to it. He reproved me in this connection. ... When Allah's Messenger came to Medina, I went to him in the morning with the camel. He paid me its price and returned that (the camel) to me.[47]

Jabir reported: We went from Mecca to Medina with Allah's Messenger when my camel fell ill, and the rest of the Hadith is the same. (But it is also narrated in it) He (the Holy Prophet) said to me: "Sell your camel to me." I said: "No, but it is yours." He said: "No. (it cannot be), but sell it to me." I said: "No, but, Allah's Messenger, it is yours." He said: "No, it cannot be, but sell it to me." ***I said:*** "***Then give me an 'uqiya of gold*** for I owe that to a person and then it would be yours." He (the Holy Prophet) said: "I take it (for an 'uqiya of gold) and you reach Medina on it." As I reached Medina, Allah's Messenger said to Bilal: "Give him an 'uqiya of gold and make some extra payment too." He (Jabir) said: "*He gave me an 'uqiya of gold and made an addition of a quart.*" He (Jabir) said: "The addition made by Allah's Messenger was with me (as a sacred trust for blessing) and lay with me in a pocket until the people of Syria took it on the Day of Harrah."[48]

Jabir reported: My camel had grown tired as Allah's Messenger came to me. He goaded it and it began to jump. After that I tried to restrain its rein so that I could listen to his (Prophet's) words, but I could not do that. Allah's Apostle met me and said: "Sell it to me," and ***I sold it for five 'uqiyas***. I said: "On the condition that I may use it as a ride (for going back) to Medina." He (the Holy Prophet) said: "Well, you may use it as a ride up till Medina." When I came to Medina I handed over that to him and ***he made an addition of an 'uqiya*** (to that amount which had been agreed upon) and ***then presented that (camel)*** to me.[49]

Abd Mutawakkil al-Najl reported from Jabir b. ʿAbdullah who said: "I accompanied Allah's Messenger in one of his journeys (the narrator says, he said in Jihad), and he narrated the rest of the hadith, and made this addition: He (the Holy Prophet) said: 'Jabir, have you received the price?' I said: 'Yes,' whereupon he said: 'Yours is the price ***as well as the camel***.'"[50]

Jabir b. ʿAbdullah reported: Allah's Messenger bought a camel from me for two 'uqiyas and a dirham or two dirhams. As he reached Sirar (a village near Medina), he commanded a cow to be slaughtered and it was slaughtered, and they ate of that, and as he (the Holy Prophet) reached Medina he ordered me to go to the mosque and offer two rak'ahs of prayer, and he measured for me the price of the camel and even ***made an excess payment to me***.[51]

Jabir b. ʿAbdullah reported this narration from Allah's Apostle but with this variation that he said: "He (the Holy Prophet) bought the camel from me on a stipulated price. And he ***did not mention two 'uqiyas and a dirham or two dirhams***, and he commanded a cow (to be slaughtered) and it was slaughtered, and he then distributed its flesh."[52]

Jabir (Allah be pleased with him) reported that Allah's Apostle (may peace be upon him) said to him: "I have taken your camel ***for four dinars***, and you may ride upon it to Medina."[53]

Reviewing the collection of hadith in light of the points raised above gives the following summarization of facts.

(i) Specifying and agreeing a price

Hadith Number	Price
3886	One *'uqiyyah*
3888	No price mentioned
3891	Five *'uqiyyah*
3893	Two *'uqiyyah* and a *dirham* or two
3894	No mention of two *'uqiyyah* and a *dirham* or two
3895	Four *dinars*

(ii) Setting the price

Hadith Number	Price Setter
3886	Unclear
3889	Jabir
3891	Jabir
3893	Unclear
3895	The Prophet

(iii) Reluctance of the seller

Hadith Number	Reluctance of Seller
3888	Yes
3889	Yes
3863	No
Bukhari, vol. 3, 310	No

(iv) Stipulating or offering the return ride

Hadith Number	Return Ride
3886	Jabir stipulated
3888	Jabir stipulated
3891	Jabir stipulated
3889	No stipulation mentioned

(v) The price that the Prophet paid plus any extras

Hadith Number	Extras
3886	Originally stipulated price and extra
3888	No extra mentioned
3889	One *qirat* extra
3891	Originally stipulated price and extra
3892	No extra mentioned
3893	Unspecified extra

(vi) Return of the camel with its price

Hadith Number	Camel Returned With Price
3886	Yes
3888	Yes
3889	Return of camel and price not mentioned
3891	Yes
3892	Yes
3893	Return of camel and price not mentioned

As the case concerning the transaction of the camel illustrates; whether (a) the Prophet set the price or Jabir asked, or (b) whether the price agreed was one *'uqiyyah*, five *'uqiyyah*, two *'uqiyyah* and a *dirham* or two, or four *dinars* or no price was mentioned at all, or (c) whether the ride was stipulated by Jabir or not, or (d) whether the Prophet offered any extra and how much this was; or (e) whether the Prophet returned the camel with its price or not, none of these points is consistent within just this one transaction alone. The whole set of incongruent information originates from just one source. In contrast, another hadith elsewhere in *Sahih Muslim* indicates that Jabir was deeply saddened when the camel was returned to him.[54] Checking other collections in this regard reveals no mention of either the extra payment or the return of the camel in a different narration contained in *Sahih al-Bukhari*.[55] Also in *Sahih al-Bukhari*, another report does not contain any mention of the extra payment, only that the camel was returned instead.[56] Contradicting the information about Jabir stipulating the ride, another hadith from *Sahih al-Bukhari* mentions that it was the Prophet who suggested: "Sell it to me, and you have the right to ride it till Medina."[57] This hadith also maintains that Jabir was paid the price and his camel returned, together with a share of the war booty.

In closing this section a further hadith on the same theme, but involving a more drastic variation, occurs in *Sunan Ibn Majah* and should not be neglected:

> Jabir b. Abdullah is reported to have said, "I was accompanying the Holy Prophet in a military expedition. He said to me, 'Will you sell this camel of yours for a *dinar* (to me)? May Allah forgive you.' I said, 'Allah's Messenger, it will be your camel when I arrive at Madinah.' He said, 'Will you sell it for two dinars, may Allah forgive you?'["] He (Jabir) said, ["]He (the Prophet) continued to increase a dinar for me and each time he continued to say, 'And may Allah forgive you,' till he arrived at twenty dinars. When I arrived at Madinah, I caught hold of the camel's head and came with it to the Holy Prophet, whereupon he said, 'O Bilal, give him twenty dinars from the spoils of war,' and he said (to me), 'Take your camel and go with it to your family.'"[58]

Which stipulation did the particular transaction specify in this example? The case in point here is the derivation of a rule or a code relating to whether a stipulation is permissible (especially, concerning transactions involving camels or animals) based on these widely variant reports and how this can be achieved, if at all? Despite the seeming difficulties it may still be possible to derive some codes by discerning and extracting the essence of the reports. In actual fact, the real issue here is whether a stipulation can be added to a sale transaction or not. It would appear from other evidences that the answer is a resounding yes. However, is reference to this particular transaction, and the widely variant reports about it really required? There already exists a broadly established Islamic principle, which holds that anything not specifically prohibited in the Qur'an or Sunnah can be included to set the terms of a transaction via mutual agreement. Thus, whether the ride is stipulated or not, or the extra price is paid or not, or the camel is returned as a gift or otherwise, is already covered by this general principle:

> O you who believe! do not devour your property among yourselves falsely, except that it be trading by your ***mutual consent***; ... surely Allah is Merciful to you. (*Surah al-Nisa'*, 4:29)

> Abu Sa'id Khudri is reported as saying:
> Allah's Messenger (pbuh) said, '***A transaction is valid as a result of mutual consent***.' [*Innamaa al-bay'u 'an taraadi*]; according to al-Zawaid, its isnad is sahih and its authorities are reliable (and authentic). Ibn Hibban transmitted it in his Sahih.[59]

With so much discrepancy in the reports concerning this specific transaction – when one cannot even ascertain the relevant facts of the transaction – there is sufficient doubt cast to dispute their authoritative or binding nature on the Muslims.

4. *The Hadith Literature Provides Knowledge or Information That is Certain or Definitive*

When dealing with certain issues or relevant information to determine its appropriateness, credibility and applicability from the Islamic

viewpoint, beyond the general principles and guidance of the Qur'an, Muslims must turn to the Hadith. However, in the case where someone mentions a piece of information originating from a tradition many Muslims are content with this fact often failing to enquire (and the reporter usually does not offer this information in any case) which report is being referred to. Sometimes the book of Hadith (e.g. al-Bukhari, Muslim, Abu Dawud, etc.) is mentioned, but only in passing. Alternatively, other parties may seek or share, as appropriate, more detailed information regarding the location of the report in the particular book of Hadith concerned. Many Muslims are thoroughly satisfied merely by the thought that a particular position, viewpoint or information is supported by the Hadith, in any event.

Still others probe further to determine whether a hadith is s*ahih* or authentic. Some major problems arise at this level. Firstly, as presented above, a collection of Hadith classed as s*ahih* is no guarantee that all the reports in it are authentic.

Secondly, even in the case of narrations recognized as s*ahih*, scholarly opinion varies on their exact status. In other words, one report that may be classed as authentic by one scholar is not necessarily authentic in the eyes of another scholar; Nasiruddin al-Albani classified many formerly *sahih* narrations as inauthentic. Although the work of scholars like al-Albani remains controversial, divergent opinion exists between most of the major Hadith scholars concerning a wide variety of hadith.

Thirdly, and by far the most pertinent problem, does the Hadith literature, including that which is considered s*ahih*, provide certainty of knowledge? It is generally agreed that all doubt is extinguished only in the case of *mutawatir* Hadith:

> "*Mutawatir*: report of a large number of narrators whose agreement upon a lie is inconceivable. This condition must be met in the entire chain from the origin of the report to the very end.
>
> In the view of Muslim scholars any Hadith which has been transmitted by *tawatur* and whose reporters based their reports on direct, unambiguous, perception unmixed with rationalization would produce knowledge with certainty."[60]
>
> A *mutawatir* tradition is one which has been transmitted throughout the

> first three generations of Muslims by such a large number of narrators that the possibility of fabrication must be entirely discarded.[61]

> [T]he *mutawatir* Hadith stands on the same footing as the Qur'an itself.[62]

> According to the majority of Ulama, the authority of a *mutawatir* Hadith is equivalent to that of the Qur'an. Universal continuous testimony (*tawatur*) engenders certainty (*yaqin)* and the knowledge that it creates is equivalent to knowledge that is acquired through sense-perception.[63]

> A great majority of Muslim legal theoreticians (*usuuliyyun*) espoused the view that the *mutawatir* yields necessary or immediate knowledge (*daruri*), whereas a minority thought that the information contained in such reports can be known through mediate or acquired knowledge (*muktasab* or *nazari*).[64]

Those narrations that are not classed as *mutawatir* are known as *ahad* (solitary) reports. No matter the authenticity of the latter, according to the majority of Islamic scholars, these are not beyond doubt, yielding certainty of knowledge. In addition, *mutawatir* hadiths have been further classified into two subcategories: *mutawatir bi al lafz* (which involve narrations that occur according to identical wordings) and *mutawatir bi al maʿna* (which involve narrations that "concur in their purport but differ in wording or in form").[65] Clearly, the second category does not command the same status as *mutawatir bi al lafz*, which is regarded as "equivalent to that of the Qur'an."

Therefore, *mutawatir* hadiths are generally s*ahih*, but not all s*ahih* hadiths are *mutawatir*. For this reason it is important to determine the number of *mutawatir* Hadith to understand their potential impact:

> Only a few Hadiths have been mentioned as *Mutawatir* by words, meaning all the narrators used the same expression. However, *Mutawatir* in sense and meanings are numerous.[66]

> Very few of the traditions received by us belong to this category (i.e., *Mutawatir*).[67]

> Finally, we turn to the problem of the *Mutawatir* which engenders cer-

> tainty. We recall that Ibn al-Salah himself acknowledged that the traditionists' repertoire of Hadith does not include this category. But Ibn al-Salah said more. He argued in categorical terms that the *Mutawatir* is a rarity. 'He who is asked to produce an example of a Hadith that is transmitted in a *Mutawatir* [fashion] will be exhausted by his search.' In his own search for such Hadiths, **he could cite only one**, presumably narrated by more than a hundred Companions: 'He who intentionally lies concerning something I [viz., the Prophet] have said will gain a seat in Hellfire.' The other Hadith which he could find that seemingly met the standards of the *Mutawatir* was: 'Acts are judged by intentions.' However, he acknowledges that although this Hadith was reportedly narrated by a *Mutawatir* number of transmitters, its apodictic manner of transmission occurred in the middle tiers of transmission, not from the outset ... The later legal theoreticians Ansari (d. 1707 AD) and Ibn 'Abd al-Shakur (d. 1810 AD) accepted the general tenor of Ibn al-Salah's argument about the scarcity of *tawatur*, but seem to think that there are more Hadiths of this type in existence. Having enumerated, with what seems to be great difficulty, four such Hadiths, they call upon Ibn al-Jawzi (d. 1201 AD) who is quoted as saying: 'I have tracked down the *Mutawatir* Hadiths and found a number of them.' **He enumerates six**, at least one of which, and probably two, had already been listed by Ansari and Ibn 'Abd al-Shakur. Thus, a thorough search by a number of the most eminent traditionists and **jurists of Islam could yield no more than eight or nine Hadiths of the *Mutawatir* type**.[68]

Thus, no more than ten *ahadith* correspond to *mutawatir* narrations proper; the rest constitute *ahad* (non-*mutawatir*) reports or *mutawatir* in terms of meaning only. These *ahadith* yield only ***probabilistic***, not certain knowledge. Hallaq analyzed this issue in detail based on the works of the major Islamic scholars, especially the Hadith scholars:

> The contents of the former (i.e., *ahad*) are known only with probability. ... When a person hears a Hadith narrated by one transmitter [i.e. *ahad*], he is presumed to have gained only probable knowledge of its contents, and thus of its authenticity.[69]

To better understand this classification into *mutawatir* and *ahad* two

views need to be appreciated. The first is represented, for example, by the eminent Islamic scholar Ibn al-Salah Shahrazuri(d. 1245 CE) who was held to be "one of the most distinguished traditionists of the *muta'akhkhirun*."[70] Ibn al-Salah's work in the field of Hadith "was so comprehensive in its excellent treatment of the subject that it came to be the standard reference for thousands of scholars and students of Hadith to come, over many centuries until the present day." His major work *ʿUlum al-Hadith* (commonly known as *Muqaddimah Ibn al-Salah*) was used by many great scholars from the later generations. Among the major scholars that benefited from Ibn al-Salah's works are: Al-Nawawi (d. 1277 CE), Ibn Kathir (d. 1373 CE), Ibn Hajar al-ʿAsqalani (d. 1447 CE), al-Suyuti (d. 1505 CE), et al.[71]

Accordingly, Ibn al-Salah "... explicitly states that in the traditionists' discourse the taxonomy of the *mutawatir* is nowhere to be found; and this, he says, is due to the fact that such Hadiths do not constitute part of their riwaya."[72]

Because *mutawatir* type hadith are rare Ibn al-Salah has argued that for much of Islamic praxis certainty of knowledge is neither feasible nor required. Rather, probabilistic or reasonable knowledge is adequate to determine the gamut of Islamic practices:

> If the *Mutawatir* was not part of the traditionists' repertoire of Hadith, then what they handled were Hadiths of the *ahad* type, or those even of a weaker sort. The sources, as is well-known, make it quite clear that the traditionists set forth a classical taxonomy which distinguishes between three main types: the *sahih* (sound), the *hasan* (good), and the *da'if* (weak).[73]

Thus, a separate taxonomy that includes *sahih* came into existence due to the recognition that Hadith yielding certain knowledge are rare. However, Ibn al-Salah and other scholars did not consider this problematic. Instead, they attempted to argue that the *sahih* category itself yields certainty of knowledge:

> The *Ahad*, or solitary, Hadith ... is a Hadith which is reported by a single person or by odd individuals from the Prophet. ... [Such Hadith] fails to fulfill the requirements of either the *Mutawatir* or the *Mashhur* [well recog-

> nized]. It is a Hadith which does not impart positive knowledge on its own unless it is supported by extraneous or circumstantial evidence. This is the view of the majority, but *according to Imam Ahmad ibn Hanbal and others, Ahad can engender positive knowledge*. Some ulema have rejected it on the basis of an analogy they have drawn with a provision of the law of evidence, namely that the testimony of one witness falls short of legal proof. Those who unquestioningly accept the authority of *Ahad*, such as the Zahiri school, maintain that when the Prophet wanted to deliver a ruling in regard to a particular matter, he did not invite all the citizens of Medina to attend.[74]

The majority of the orthodox *ulama'* recognize the reliability of *ahad* hadiths, subject to some conditions: "According to the majority of the ulema of the four Sunni schools, *acting upon ahad is obligatory even if ahad fails to engender positive knowledge*. Thus, in practical legal matters, a preferable *zann* [speculation] is sufficient as a basis of obligation. It is only in matters of belief where conjecture 'avails nothing against the truth.' Having said this, however, *ahad* may only form the basis of obligation if it fulfils…" six conditions.[75]

As usual, there is no unanimity among the various schools regarding these conditions.[76] However, the statement above – acting upon *ahad* is obligatory even if *ahad* fails to engender positive knowledge – is contradicted by other scholars who believe that acting upon *ahad* is preferable only because it engenders merely ***speculative*** knowledge:

> The majority of jurists, however, agree that *Ahad* may establish a rule of law provided that it is related by a reliable narrator and the contents of the report are not repugnant to reason. *Many* ulema *have held that Ahad engenders speculative knowledge, acting upon which is preferable only*. In the event where other supportive evidence can be found in its favour or when there is nothing to oppose its contents, then acting upon *Ahad* is obligatory. But *Ahad* may not, according to the majority of ulema, be relied upon as the basis of belief (*'aqidah*).[77]

It must be noted that this dictum – *ahad* cannot be relied upon as the basis of belief – is merely a pious statement. Any Muslim can read the books concerned with the subject of *'aqidah* (core belief), such as *Kitab*

al-Tawhid by Muhammad ibn Abdul Wahhab, or *Al-Wala' wa al-Bara'* by Muhammad Saeed al-Qahtaani, to observe just how these lengthy treatises could have been written without resort to solitary narrations.

In reality, almost the entire Hadith literature is composed of *ahad* narrations that do not yield certainty of knowledge. Yet many scholars have staked their claim that *ahad* Hadith are beyond doubt; this is akin to having their cake and eating it. One of the reasons why Muslims regard the entire Qur'an wholly beyond doubt is because each of its verses is *mutawatir*. Similarly, "According to the majority of ulema, the authority of a *Mutawatir* Hadith is equivalent to that of the Qur'an."[78] The authenticity of the Qur'an is based on the premise that *mutawatir* transmission yields certainty of knowledge, and since each verse of the Qur'an is *mutawatir* the Qur'an, as a text, is regarded by Muslims as constituting positive knowledge. If *ahad* or solitary transmissions are also held to yield the same level of positive knowledge then this would be equivalent to the contention that positive knowledge can be achieved in the case of either *mutawatir* or *ahad* transmission. However, this claim or premise, at least indirectly, undermines the special status ascribed to *mutawatir* transmission.

In the case of the use of *ahad* Hadith to derive or establish laws and codes, this constitutes a quite different issue. On the other hand, unless Muslims are willing to reconcile themselves to undermining the basis of the Qur'an, the claim that *ahad* Hadith can yield certainty of knowledge has to be seriously questioned.

Indeed, prominent *'ulama'*, such as Imam al-Nawawi, opposed Ibn al-Salah's view in this regard and firmly challenged his untenable claim that *ahad* Hadith yield certainty of knowledge:

> Nawawi ... and Ibn al-Salah seem to have spearheaded the two opposing campaigns. Nawawi unequivocally states that 'the *sahih* means just that, *sahih*, and does not mean that it is certain.' He vehemently argued that the majority of Muslim scholars and leading authorities (*al-muhaqqiqun wal-akthartun*) held that unless the *sahih* is of the *mutawatir* category, it shall remain probable and can never attain the level of certainty.[79]

The weakness in Ibn al-Salahs position – that *sahih*-type narrations

yield certainty – should now stand exposed. In this regard, Imam al-Nawawi's position is sound and it should be self-evident that only *mutawatir*-type transmission avoids doubt. Thus, as long as the probabilistic basis of *ahad* or non-*mutawatir*-type Hadith in establishing Islamic dogmas or practices is recognized, then the situation and our responses to it change accordingly.

The crux of the issue connecting Hadith to Islamic jurisprudence is that Islamic law and its codification is mostly based on the non-*mutawatir* or *ahad* Hadith literature, which is at best *probabilistic*:

> The legal theoreticians' classification of the Hadith into *Mutawatir* and *ahad* leaves us with a colossal number of the latter, merely probable type, and less than a dozen of the former, reportedly apodictic, variety. The *ahad*, including the *hasan*, were universally acknowledged to have constituted the bulk of Hadith with which the traditionists dealt, and on the basis of which the Jurists derived the law.[80]

Earlier, it was explained that the classification of Hadith into *mutawatir bi al-maʿna* occurs when the Prophet's statements are conveyed in the narrator's own words. To reiterate, these are "conceptual transmissions." Similarly, even in the case of solitary narrations, the scholars do not require verbatim transmission, insisting instead that laws and codes derived from *ahad* Hadith can still be binding:

> The majority of ulema do not insist that the *Ahad* should consist of a verbatim transmission of what the narrator heard in the first place, although this is the most authoritative form of transmission in any kind of Hadith. They would instead accept the conceptual transmission of an *Ahad,* on condition, however, that the narrator understands the language and purport of the Hadith in full. ...
>
> Some ulema of the Hanafi and other schools have held that conceptual transmission is totally forbidden, a view which is refused by the majority, who say that the Companions often transmitted one and the same Hadith in varying words, and no-one can deny this. ... Having said this, however, accuracy in the transmission of Hadith and retaining its original version is highly recommended.[81]

The majority of the Islamic scholars hold the view that *ahad* Hadith

can be used to derive binding laws or codes. However, in the matter of creedal beliefs (ᶜ*aqidah*) these cannot be established by *ahad* Hadith. Nevertheless, in the domain of creeds even these have not been immune to encroachment by solitary narrations. As mentioned previously, the claim of many scholars – that it is not only permitted to use *ahad* Hadith to formulate laws, but also, subject to some conditions about which there is no agreement, the laws so derived are binding – is a rather weak position which requires further scrutiny.

A case in point, is that even the best and noblest Muslim scholars have demonstrated remarkable asynchronicity in their thoughts and practices in this context. Imam Shafiᶜi writes in his famous *Risalah*:

> It is the duty of those who have [legal] knowledge never to express an opinion *unless it is based on* ***certainty***. There are cases where men have discussed matters relating to [legal] knowledge when, if only they had abstained from so doing, abstention would have been more appropriate and safe, I trust.[82]

If it is the case that the scholar is duty-bound not to express an opinion *unless it is based on* ***certainty***, then one wonders how it is that much of the Islamic legal edifice has been formulated on the basis of reports that yield mostly ***probabilistic*** knowledge?

Thus, as anomalous as it may seem, the majority of scholars and jurists has obviously held the position that a hadith, which is *ahad*, does not mean that it cannot or should not be used as a source of guidance. Indeed, the majority regard as binding even the injunctions of these reports.

On the other hand, the Ummah – the general adherents of Islam – would be better served if all *ahad* narrations – that is, most of the Hadith literature – were duly acknowledged as being probabilistic in terms of their reliability. And that additional circumspection is a must when utilizing these to formulate laws, codes and dogmas. Even greater circumspection is a must in formulating and enacting laws or codes that have major ramifications concerning people's life, honor and property.

(II) USE AND ABUSE OF HADITH IN THE FORMULATION AND VALIDATION OF ISLAMIC LAWS

Since the time of the Prophet Muslim societies have developed a legalistic tendency, where the trend is to reduce to black and white, right and wrong, permissible and impermissible all issues. While the emergence of various *madhhabs* (schools of jurisprudence) has arguably had beneficial aspects, one important consequence of this was the rise of legalism concomitant with the splintering and fragmentation of Muslim society into many schools (*madhhabs*) and other offshoot groups (*firqah*); sometimes these engaged themselves in the corrosive practice of pronouncing *takfir* (excommunication) against each other.[83]

The second and more important consequence of this trend relates to the many laws promulgated in the name of Islam that demonstrate a clear gender-bias, as well as promoting other unfair tendencies inconsistent with the Islamic principle of equity and fairness. In this context, it is important to note that orthodox Islamic positions are generally formulated in a male-exclusive domain where women are basically absent from the deliberation and formulation of these laws, codes and norms. The sobering examples and observations presented below constitute some of the basic orthodox positions in this regard. It should be pointed out, in all fairness, that there is, of course, no monolithic position on most of these matters and it should be noted that due to the pressures of modernity, as well as other factors, Muslim societies are currently in a state of flux. However, the books of fiqh often remain untouched even by these forces and their unrepudiated positions remain as orthodox as ever. This does not mean, or imply to mean, that the Muslim scholars or jurisprudents had any ill intent; rather theirs was the mistake of excessive, improper or unwarranted use of Hadith. Consider the following few representative examples.

1. *Discouragement of Women From Mosque Participation*

In most Muslim-majority countries,[84] women are not seen participating in large numbers during congregational prayers (salah) held within the mosques because they are prevented from doing so. In some countries, for example Tajikistan, they are banned entirely.[85] Even in North

America, despite many mosques' attempts to be more flexible, there are many others that simply do not desire women within their precincts; if, for some reason, they have to "tolerate" the presence of females, it is made quite difficult and uncomfortable for them. As a consequence many women who love Islam are fuming and some have turned rebellious. Compounding matters are orthodox positions, which set out a detailed response to the question "Why is it better to pray at home for women?"[86]

Many narrations establish the categorical Prophetic instruction not to prevent women from attending the mosques. The Prophet ordered regular and unhindered female participation. However, among the reports that are instead most commonly invoked to discourage or even prevent women from attending in the present age are the following:

> Abdullah ibn Mas'ud:
> The Prophet (s) said: It is more excellent for a woman to pray in her house than in her courtyard, and more excellent for her to pray in her private chamber than in her house.[87]

> Narrated 'Ayesha:
> Had Allah's Apostle known what the women were doing, he would have forbidden them from going to the mosque as the women of Bani Israel had been forbidden. Yahya bin Said (a sub-narrator) asked 'Amra (another sub-narrator), "Were the women of Bani Israel forbidden?" She replied, "Yes."[88]

Note that ʿAbdullah ibn Masʿud's report does not constitute a *mutawatir* hadith. Even as a *sahih* (but not *mutawatir*) hadith, this fact does not yield the certainty of knowledge required to ensure the veracity of the Prophet's speech on the matter. Contradicting this tradition are numerous reports, which state that women used to participate in the mosques both regularly and in large numbers. Therefore, either the participating women in question did not care about the Prophet's instructions to them (even in his own presence) or they understood the hadith quite differently.

As for the second of the two narrations, although this hadith appears in *Sahih al-Bukhari* it is not a statement that originates from the

Prophet. In fact, it is merely the opinion of a Companion (although a great and particularly close Companion who happened to be the wife of the Prophet). In the technical Islamic jargon, this type of narration is called *athar*. However, even though highly respected and revered – quite deservingly so – among the Muslims as a Companion, narrator of hadith and his wife, it still constitutes only a lone opinion which did not emanate from the Prophet's mouth. Moreover, it is instructive that there is absolutely no corroborating information, statement or report *from the same period* which indicates that women were committing egregious acts in the mosques such that had the Prophet known he would have prevented them from attending. Narrations that are *athar* do not themselves possess any binding implication, according to the vast majority of scholars and commentators.[89] As al-Sharif al-Jurjani (d. 1413 CE), an eminent Hadith scholar, commented in his *Mukhtasar*:

> Whatever is related from a Sahabi [i.e., a companion of the Prophet], either in the form of a saying or in the shape of action, whether narrated by a continuous chain of narrators or not, is not a binding instance.[90]

Unfortunately, although reports of this kind do not constitute hadiths, and hence are not even binding, they have had a profound effect on Muslim culture leading to gross restrictions on the public participation of women. These same *athar* narrations are still used and regularly invoked by the traditionalists to separate women from their places of worship.

2. *Leadership Positions Barred to Women*

Rather than constituting a *mutawatir* text, one solitary (*ahad*) report from Abu Bakrah (not to be confused with the first *Khalifah* Abu Bakr, see below) has resulted in the rigid orthodox position whereby women are barred from exercising executive leadership. Some jurists have restricted the ban so that it covers only the position of *Khalifah* or head of state. Others basically hold the position whereby women are forbidden from assuming *any* leadership role except among women or within all-women structures (organizations, institutions etc):

> Narrated Abu Bakra:
> During the battle of Al-Jamal, Allah benefited me with a Word (I heard from the Prophet). When the Prophet heard the news that the people of Persia had made the daughter of Khosrau their Queen (ruler), he said, "Never will succeed such a nation as makes a woman their ruler."[91]

This hadith had a profound effect on the orthodox position about women's leadership:

> For hundreds of years, this Hadith has been taken to mean by a majority juristic opinion that a woman cannot be a nation's leader (*khalifah*), and as such she should not be allowed to be a judge (which is part of the function of a *khalifah*). This juristic opinion resulted in the regression of the status and position of women in society, to the extent that Muslim women were unable to equally enjoy the rights that were enjoyed by men. These rights included political rights and political participation, holding higher public offices, becoming witnesses, judges and leaders. Nevertheless, the other opinion which stems from this Hadith allows women to be judges, but not leaders or heads of government.[92]

However, not only does the issue of the internal consistency of this hadith, in terms of its historical reference arise,[93] but also the individual, Abu Bakrah, is known to have received the punishment reserved for committing false testimony.[94] According to the measures set to determine authenticity (*sahih*), this hadith does not meet the standards established by al-Bukhari himself, though he included it in his collection. Even though Mernissi's analysis and research concerning Abu Bakrah's flogging are disputed,[95] as far as deducing a code that leads to the prohibition of women leaders is concerned, it is extremely doubtful that a solitary report of so dubious and disputed an origin can establish the degree of certainty required for such a sweeping and strict prohibition of women's leadership.

In remarkable contrast with this hadith of disputed authenticity, the Qur'an discusses the story of Balqis, the queen of Saba' (Sheba) without any hint of negativity about women's leadership whatsoever. Indeed, the Qur'anic portrayal of Balqis, as a queen and thus at the highest political office, is entirely positive. Yet, the Qur'anic narrative

in this regard has been set aside in favor of this hadith narrated by Abu Bakrah. (*Surah al-Naml*, 27:20–44) As Asghar Ali Engineer aptly sums up, at least in this context: "[w]omen lost in ahadith what they had gained through Qur'an."[96]

3. *Right of Guardianship to Contract Minors Into Marriage*
While traditional Islamic law permits the marriage of minors the practice was inherited from the prevalent customs in Arabia before the advent of the Prophet's mission. However, the marriage of a minor represents a fundamental contradiction of the liberty and human dignity of each and every individual when that person is denied his or her own choice as an adult to freely exercise one of the foremost decisions in one's life. This is a violation of the fundamental right to human dignity, the foremost value discussed in Chapter Two. The traditional orthodox position regarding the right of guardianship over contracting the marriage of a minor, be they boy or girl, stands according to the order of hierarchy specified by the Hanafi school:

1. Father
2. Grandparents and above
3. Brother
4. Step-brother
5. Nephew
6. Step-nephew
7. Uncle
8. Step-uncle
9. Cousin
10. Step-cousins and similar relatives (from the side of the father in the priority established according to the law of inheritance)
11. **Mother**
12. Son's daughter
13. Daughter's daughter
14. Grandson's daughter
15. Daughter's grandaughter
16. Sister
17. Step-sister
18. Step-brother
19. Other relatives from the mother's side in accordance with the law of inheritance
20. Ruler/judge

The list above may vary depending on the *madhhab*, although in Bangladesh, as well as across South Asia, Hanafi fiqh is, in general, predominant, and the hierarchy instituted is as above. The textual source

that sets out the rank order is taken from *Bidhibadhdha Islami Ain* (Codified Islamic Law), a well-known compendium of *fiqhi* answers based on authoritative Hanafi sources published by the Islamic Foundation in Dhaka.[97] Another well-known and highly popular book, *Bahishti Zewar* by Ashraf Ali Thanvi, contains the same hierarchy.[98]

Note the position of the mother in the order of priority of guardianship; she appears eleventh on the list after ten male relatives including, unbelievably, step-relations. Leaving aside the matter of sanctioning the practice itself for one moment, what is the basis for ranking the mother eleventh in the hierarchy of guardianship in determining her child's marriage status one ponders? The Qur'an and Sunnah provide neither evidence for the order of guardianship over the minor nor any for the practice itself.

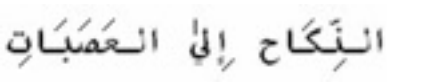
Considering the hierarchical ranking from a different angle; according to orthodox Islamic law, for blood-related family members, on whom the responsibility of maintenance is assigned, the order of priority is as follows:

1. Husband
2. Father
3. **Mother**
4. Jointly on paternal or maternal grandparents and grandchildren
5. Son
6. Blood-relations [99]

Comparison of the order of priority concerning the duty of maintenance with the hierarchy over the right to exercise guardianship demonstrates a remarkable mismatch between the two. In the former, the mother is ranked close to the top – immediately after the husband and father – in the latter, she is ranked eleventh. Where is the sense of justice or reciprocity (in duty and right) in this respect?

The importance of paternal kindred in the hierarchy is contained in, for example one of the most authoritative Hanafi collections, *Hedaya*. A hadith quoted there, but without a relevant citation, states: "The Prophet having declared 'Marriage is committed to the paternal kindred …'"[100]

The reference to the narration in question found in *Hedaya* is not traceable to any of the Hadith collections. The Arabic text is as follows. However, it does belong to the work *Mabsut* authored by al-Sarakhsi who died in 1096 CE.[101]



Al-Nikah ila al-ʿAsabat

Never mind representing a *mutawatir* or *mashhur* (well-known) hadith, this report originates from a source outside the Hadith collections. Curiously, Haskafi's *Durr al-Mukhtar*, a Hanafi legal compendium from a much later period, written in the footstep of previous works, such as *Hedaya*, omits this hadith in discussing the relevant passage.[102] Also, the view has been expressed that "the super-gloss (*Hashiyah*) of Ibn ʿAbidin (d. 1836 AD), entitled *Radd al-muhtar ʿala Durr al-mukhtar*, that summarizes all Hanafi views up to his time, does not include this hadith."[103]

Nyazee has commented on the same report in his translation of *al-Hidayah* (*Hedaya*):

> The text in al-Zayla'i is missing for this tradition. Al-Zayla'i, vol. 3,195. This tradition has been quoted by Imam al-Sarakhsi. It has not been recorded by any of the sound compilations. The Imams of the four schools of law have unanimously accepted this tradition. It is, however, reported as *mawquf* and *marfu'* from 'Ali. See Al-Ayni, vol. 5, 93.[104]

This is yet another remarkable example of the exaggerated use of a hadith, demonstrating the propensity of the scholars to resort to desperate measures when hard pressed to find Prophetic narrations to justify their position. Thus, a narration that is not attributed to any Hadith collection, which is considered both *mawquf* ("a tradition whose chain stops at the Companions")[105] and *marfuʿ* (the chain or "*isnad* of the hadith going back to the Prophet, though it might be broken somewhere")[106] has been resorted to in order to establish an assumed paternalistic position. Complicating matters still further, the

context and significance of this report are not clear either. And so it is that, based on a lone narration from a disputed source originating from outside the established Hadith collections, an outlandish restriction on the rights and duty of women towards their own minors has been imposed and continues to persist to this day. Yet, in terms of the priority of their responsibility of maintenance, the mother is right where she should be; next to the child's father, her husband.

4. *Punishment for Apostasy*

One of the most glaring examples of the abuse of Hadith concerns the punishment of apostasy. The overwhelming traditional view is that the verdict for apostasy (*riddah*) is not merely that it is a punishable act, but that the punishment must be by death.[107] Even some of the most notable recent and contemporary scholars, including Taqiuddin al-Nabhani,[108] Sayyid Abul A'la Mawdudi,[109] Yusuf al-Qaradawi,[110] and others, uphold this traditional stance.

Islam does consider apostasy a grave sin, but this is a matter between God and the apostate. There is no verse in the Qur'an that deals with or mentions any punishment solely for apostasy in this world.[111] Conversely, the Qur'an is unequivocal in affirming the principle of religious freedom (*Surah al-Baqarah*, 2:256).[112]

According to the traditional position, apostasy, even when it is not related to treason or rebellion, is punishable or subject to capital punishment according to the Hadith literature.[113] One particular report that is central to the traditional position on apostasy is: "Kill the one who changes his religion (*man baddala dinahu faqtuluhu*)."[114] This happens to be an *ahad* or solitary hadith. The majority of the scholars "are in agreement that the prescribed penalties (*hudud*) cannot be established by solitary *Hadith* (*ahad*), and that unbelief by itself does not call for the death penalty."[115]

Surely, if the penalty of death was valid, and being so grave a matter, the Qur'an would have addressed it. Moreover, there is no hadith attesting to the established Prophetic practice that demonstrates this particular act of punishment solely for those who committed apostasy. On the contrary, a concrete example of how the Prophet handled a case of simple apostasy, unrelated to any treason or rebellion, is contained in the following sound hadith:

> A bedouin gave the Pledge of allegiance to Allah's Apostle for Islam. Then the bedouin got fever at Medina, came to Allah's Apostle and said, "O Allah's Apostle! Cancel my Pledge," But Allah's Apostle refused. Then he came to him (again) and said, "O Allah's Apostle! Cancel my Pledge." But the Prophet refused. Then he came to him (again) and said, "O Allah's Apostle! Cancel my Pledge." But the Prophet refused. The bedouin finally went out (of Medina) whereupon Allah's Apostle said, "Medina is like a pair of bellows (furnace): It expels its impurities and brightens and clears its good."[116]

How did the traditional position towards apostasy emerge in the way that it did? Primarily, it appears that the scholars' failure to separate the problem of apostasy from that of treason or rebellion against either the nascent community or fledgling Islamic state during and immediately after the time of the Prophet is to blame. The later crystallization of the traditional position was further compounded by the legalistic tendency that developed at the expense of a value-oriented approach. Illustrating the mismatch between these two disparate orientations is the dissonance established between the value or principle of freedom of choice (hadith no. 4 value, discussed in Chapter Two), which includes the freedom to change one's faith, and the contradictory hadith which states that a person is to be killed for changing their belief ("kill the one who changes his religion"). However, the scholars seem to have set aside the higher Qur'anic principle in favor of a solitary hadith. This tradition may appear in the *Sahih* collections, such as Bukhari, but unless it is *mutawatir* a Prophetic report does not yield any certainty of knowledge and hence is of lower priority than the text of the Qur'an. Moreover, this hadith has many weaknesses, as discussed by Rahman.[117]

However, most importantly, the legalistic approach and perspective ignores the principles and values established in the Qur'an, while laws (particularly, harsh ones) must not contravene Qur'anic principles and norms.

The Qur'an quite categorically affirms the freedom of faith. The Prophetic practice and legacy are consistent with this fundamental position. No solitary or weak hadith which deals with the subject of apostasy-cum-treason should override the principle of freedom of faith

that is enunciated in the Qur'an. Fortunately, the contemporary view concerning the issue of apostasy is clearly modulating towards a new preponderance.[118]

(III) DIFFERING PERSPECTIVES OF LEGAL AND NON-LEGAL SCHOLARS CONCERNING HADITH

To provide the exposition above with some perspective, it is important to hold the difference between the Hadith and legal scholars in their respective approach to Hadith in focus. While the former study, scrutinize, analyze and categorize Hadith, the latter utilize or apply the Hadith (along with other sources) to derive or deduce law.

The Hadith scholars have performed a remarkable, noble and invaluable task in preserving and presenting the corpus of knowledge relating to the speech and actions of the Prophet. That the Hadith literature has evolved into a complex system of classification of oral narration into *sahih*, *hasan*, *da'if* and *mawdu'* indicates the strength of the field together with the dedication of the scholars who exerted their utmost in preserving and passing on this body of knowledge. While analytical scholarship in the field of Hadith is ongoing, how the Hadith is employed in the derivation of fiqh remains the responsibility of the legal scholars.

Jurisprudents apply a different principle regarding the use of Hadith than do non-legal scholars. As long as a narration does not contradict the established principles of the Qur'an and other attested *ahadith*, as well as the consensus (Ijma') of the Muslim scholars of law, to the legal scholars, in general, an *ahad,* or even a *da'if* report, is better as a source of law than the *Qiyas* (analogical reasoning) of an individual. Of course, there are others who hold a different position and alternatively emphasize the importance of *Qiyas* and Ijma' much more.[119]

While Muslims need to cultivate a better and more nuanced understanding of the Hadith as a source of Islamic knowledge, their scholars, including the jurisprudents, need to reexamine the existing body of Islamic law in light of the intent (*maqasid*) as well as the values and principles of Islam. It is also important for all concerned to recognize that just as Hadith, in general, are not above the level of doubt, fiqh is not

therefore a divine enterprise. Rather, it constitutes the imperfect human understanding of the infallible divine will, resulting in its promulgation in the highly misunderstood and misinterpreted articulation known as the Shari'ah.

(IV) CONCLUSION

The misapplication of Hadith related in the cases above serves to illustrate a general problem. Many conscientious Muslims would find difficulty in using Hadith to derive Islamic legal positions that seem to go against the Qur'an or the Sunnah – verdicts that are all too often presented as being based on a divine Shari'ah, whereas the majority of fiqh is merely the product of questionable human interpretation.

Even though erroneous, it is understandable that some people might turn to extremes and their inappropriate use of Hadith lead to unacceptable exaggeration of laws and codes which, in turn, results in others attacking or rejecting this source of literature in general. Indeed, there is now a breed that claims to be the followers of the "Qur'an Only." One such group and its founder, the late Rashad Khalifah, not only rejected the Hadith, but also culminated in his declaring himself the Messenger of the Covenant, as prophesied in the Qur'an according to 3:81.[120] This act, understandably, earned Khalifah the displeasure and repudiation of the general Muslim community. However, not all rejecters of Hadith are of the extreme type who believes in the false creed of new divine messengers subsequent to the Prophet Muhammad. In any eventuality, these, and all other manifestly false dogmas, need to be rejected and repudiated, but without indulging in the practice of pronouncing *takfir* (excommunication) – a by-product of which has led to mainstream and orthodox Muslims turning against and disclaiming one another.[121] Despite the problems identified by many of the rejecters of Hadith, the critiques must not be confused with the critics, because even when the critics are repudiated their critique might still be valid and, meanwhile, the reprehensible habit of indulging in religious denunciation will potentially become further ingrained in the Ummah.

As mentioned previously, the reality concerning the veracity of the Hadith lies somewhere between the position of those who reject the source altogether and those who attribute complete and utter perfection to it seeing it as divine in every aspect. The latter group effectively elevates these narrations on a par with the Qur'an, sometimes applying Hadith to supersede Qur'anic text. The body of collected traditions is, however, precious and an indispensable source in gaining detailed knowledge of the actions and speech of the Prophet, as observed and attested by his noble Companions. The Prophet has been described as the Qur'anic guidance in action. Therefore, it stands to reason the approach that aims to employ the Qur'an exclusively in the definition of things Islamic is fundamentally wrong and misguided.

Another common error committed by the proponents of Qur'an exclusivity is their rejection of the Hadith literature altogether on the basis that it is considered by them to be man-made. This is factually incorrect due to the authentication of the source by different independent means. The Prophet's sayings throughout his life, for example, were the subject of much careful memorization due to its profound application in the daily lives of the young Muslim community. The immediate generation heard these traditions and witnessed the Prophet's acts so that the community could be assured of its own correct collective conduct. Therefore, while there is some admitted problem with the preservation and dissemination of some of the Prophetic narrations, this does not mean that everything included there is man-made or has been concocted by others. The issue here is one whereby the Hadith is definitely not considered to be at the same level as the Qur'an. And since the Hadith is not like divine revelation, protected by Allah from error and corruption, there is a significant level of human intervention that must be acknowledged.

Given the fact that, except for a few (less than a dozen) Hadith, which are *mutawatir*, almost all, including those that are *sahih*, are probabilistic in terms of their knowledge. Probabilistic is not to question veracity or accuracy but to understand the vantage point from which we are looking at Hadith and to get a feel for how the science of Hadith developed to classify the sound from the good and the weak. Even those that had been forged were compiled into volumes so the

Ummah would be aware of the forgeries. Hence, this body of literature, the Hadith we have today, needs to be used more as a source of information, as well as moral inspiration and wisdom, than as an all-encompassing and sacrosanct basis for the formulation of laws and codes. As per everyone else, Muslims are also social beings who must have laws to regulate themselves; the Qur'an and the Sunnah naturally serve as sources of wisdom and guidance in formulating these. However, given the generally probabilistic nature of the Hadith, Muslims need to be more circumspect in this regard. A much more restrained approach needs to be taken when the Hadith literature is used to arrive at laws or codes that have a direct and serious impact on the life, honor and property of people. This restraint is equally relevant in the case of laws or codes that might result in discrimination and injustice. It is also important when deriving laws and codes, wherever appropriate and relevant, that a problem should be duly studied from an empirical perspective to better understand the true dimensions of the problems and conditions that Islamic law is meant to address – a subject discussed in Chapter Six.

Once the level of human input to the Hadith, in contrast to the divinely revealed and protected Qur'an, is acknowledged this source can resume its dynamic position of acting as the repository for the detailed exemplification of Islamic law. Such an approach to the Hadith would avoid elevating it to a theologically indefensible level as far as the Islamic viewpoint is concerned. It would also serve to prevent the imposition of harsh laws and codes as binding injunctions when the binding nature of those laws and codes cannot be established from Islam. Instead, through a process based on *shura* (the people's participation and representation), Muslims would be empowered to turn to the precious treasure composed of the Hadith to formulate their laws and codes. Indeed, within such a dynamic framework this literature cannot and must not be rejected, but instead turned to for guidance as part of society's legislative endeavors.

Therefore, the sacredness or authoritativeness of any Islamic law would not be ascribed solely because something originates from the Hadith, rather because it is mediated through a process of *shura*. This distinction will assist Muslims to utilize the precious guidance available

from the Hadith without theologically raising its status to the extent that it becomes untenable. Based on this criterion then, a law would only become Islamic if: (a) it has a root in the foundational sources of Islam i.e Qur'an and Sunnah, (b) it is derived with explicit attention to the norms based on the *maqasid* (objective) and values of Islam, and (c) it has been adopted by society through consultation (*shura*). Accordingly, a law would not be designated "Islamic" if the second and third conditions remained unmet.

CHAPTER 4

The Doctrine of Ijma^{c}: Is There A Consensus?

IJMA^{c} or consensus is one of the four sources of Islamic jurisprudence:

> Ijma is the verbal noun of the Arabic word *ajma'a*, which has two meanings: to determine and to agree upon something. To give an example of the former, the expression *ajma'a fulan 'ala kadha*, means that 'so-and-so decided upon such-and-such.' This usage of *ajma'a* is found both in the Qur'an and in the Hadith. The other meaning of *ajma'a* is 'unanimous agreement,' hence the phrase *ajma'a al-qawm 'ala kadha* means 'the people reached a unanimous agreement on such-and-such.' The second meaning of Ijma often subsumes the first, in that whenever there is a unanimous agreement on something, there is also a decision on that matter.[1]

The Qur'an and the Sunnah are the two primary and foundational sources of Islam, while Ijma^{c} and *Qiyas* (analogical reasoning) represent two secondary sources:

> Classical Muslim methodology (*usul*) refers to the basic textual sources and methods used in producing Muslim attitudes in different spheres of life including international relations. These sources are the Qur'an, Sunnah, Ijma (consensus), and ijtihad (the use of human reason or *aql*) in elaboration and interpretation of the Shariah. Ijtihad includes the fourth major source of Muslim thought, the Qiyas (analogy) ...[2]
>
> ... no one at all should [give an opinion] on a specific matter by merely saying: It is permitted or prohibited, unless he is certain of [legal] knowledge, and this knowledge must be based on the Qur'an and the sunna, or [derived] from Ijma (consensus) and Qiyas (analogy).[3]

From dogma to norms to laws and codes, Ijmaᶜ is recognized to have a pivotal place in Islamic discourse and socio-religious unity:

> This important doctrine played a vital role in the integration of the Muslim community. In its early phase it manifested itself as a general average opinion, a common feeling of the community, and as a binding force of the body of law against unsuccessful and stray opinions. In the classical period it developed with its complex theory and ramifications. It became a decisive authority in religious affairs. All religious doctrines were standardized through Ijma. Its rejection was considered heresy, indeed sometimes tantamount to unbelief.[4]

> It must be noted ... that unlike the Qur'an and Sunnah, Ijma does not directly partake of divine revelation. As a doctrine and proof of Shariah, Ijma is basically a rational proof. The theory of Ijma is also clear on the point that it is a binding proof.[5]

> Ijma plays a crucial role in the development of Shari'a. The existing body of fiqh is the product of a long process of ijtihad and Ijma.[6]

> Only Ijma can put an end to doubt, and when it throws its weight behind a ruling, this becomes decisive and infallible. Ijma has primarily been regarded as the instrument of conservatism and of preserving the heritage of the past. ... Ijma enhances the authority of rules that are of speculative origin. Speculative rules do not carry a binding force, but once an Ijma is held in their favor, they become definitive and binding. ... Lastly, Ijma represent authority. Once an Ijma is established it tends to become an authority in its own right, and its roots in the primary sources are gradually weakened or even lost.[7]

Interestingly, despite the well-established position of Ijmaᶜ in Islamic jurisprudence, ordinary Muslims are generally unfamiliar with the reality that Ijmaᶜ as an authority or source of Islamic jurisprudence stands on rather thin ice.

While Ijmaᶜ has to an extent played an integrative role in Islamic legal discourse, it has also contributed to some entrenched divisiveness. But even more importantly is the existence of abuses of Ijmaᶜ, in

terms of it being used as a frequently cited tool to quieten opponents or to allow abuse to occur through the frequent claim of Ijma^{c} applying to something where no Ijma^{c} is apparent. This issue is vital, because traditional opinion considers that if there is an Ijma^{c} on something, whether referring to dogma or legal issues, it is binding upon the Muslims.

Those who are not familiar with Ijma^{c} as a concept or dogma might wonder why an unambiguous definition of the term has not been alluded to from the start; there is a valid reason for this – the reader might be surprised to learn that no consensus exists even on the correct definition of the term Ijma^{c}. He/she might also be surprised to learn that great Islamic scholars such as Ibn Hanbal, Ibn Hazm, Ibn Taymiyyah and Ibn al-Qayyim "hotly contested the *Shar^{c}i* validity of any Ijma^{c} whatsoever: they saw in it only a multiplication of individual *ra'y*, unjustly sanctified merely because it was (or could be) backed by sheer numbers."[8] In this chapter, the notion of Ijma^{c} is discussed in sufficient detail so as to introduce it to ordinary Muslims, to give it clarity and to ensure they are familiar with the uses and abuses of this otherwise valid tool of Islamic jurisprudence. It also aims to provide ample illustration and assist in the recognition and appreciation of the fact that there is still room for utilizing Ijma^{c} provided the prevalent problems and limitations are dealt with and are appropriately adapted to ensure its relevancy to contemporary times.

(I) TRADITIONAL EMPHASIS ON IJMA^{c}

This segment draws extensively from Ahmad Hasan's comprehensive work, where all the references are fully annotated. From the sources indicated the following statements have been made about Ijma^{c}.

Al-Baydawi (d. 1280 CE), a Hanafi scholar:

> "One who rejects the doctrine of Ijma rejects the religion at large. This is because the orbit of all the fundamentals of religion and their returning point is the Ijma of Muslims."[9]

Al-Sarakhsi (d. 1090 CE), another Hanafi scholar:

> "One who denies the validity of Ijma seeks to indirectly demolish religion per se."[10]

ᶜAbd al-Malik al-Juwayni (d. 1085 CE), a Shafiᶜi scholar:

> "Ijma is the strap and support of the Shariah and to it the Shariah owes its authenticity."[11]

Al-Qarafi (d. 1285 CE), a Maliki jurist:

> "Ijma is anterior in respect of decisiveness to the other three sources of law, namely the Qur'an, Sunnah and Qiyas."[12]

Notably, al-Juwayni stakes the Shariᶜah's authenticity not on the Qur'an, Sunnah or *Qiyas*, but on Ijmaᶜ. Al-Qarafi goes still further, regarding in terms of decisiveness, Ijmaᶜ as holding a position higher than that of the Qur'an, Sunnah and *Qiyas*:

> Some jurists have exaggerated the value of Ijma so much so that they consider it prior to the Qur'an and Sunnah. In favour of this view it is argued that both the Qur'an and Sunnah are liable to abrogation and interpretation. But Ijma is infallible and decisive. There is no room for doubt if a rule is supported by Ijma. It is also prior to Qiyas (analogy) because the latter is sometimes liable to fallacy. It is worthy of remark that the Ijma which is considered prior to the Qur'an and Sunnah is the kind which is decisive (*qat'i*), verbal (*lafzi*), visible or tangible (*mushahad*), or reported by *tawatur*. As regards speculative Ijma, the Qur'an and Sunnah are prior to it. Supporting this viewpoint al-Isfahani remarks that Ijma is superior to all sources of law (adillah) and no authority can be basically compared with it. He ascribed this view to a large number of scholars.[13]

(II) THE CLAIM OF IJMAᶜ IS ALL TOO COMMON

By way of illustration a miscellaneous list of assertions about Ijmaᶜ is presented below to demonstrate how common the claims are for something to constitute Ijmaᶜ. Interestingly, contrary to these pretensions,

hardly any in the list represent a consensus at all: unwarranted affirmations of Ijmaʿ constitute a misrepresentation of the term.

• *Pronouncement of talaq three times at one sitting is valid*
The occurrence of three *(talaqs* is the *madhhab* of the *jumhur* (majority) and on this is Ijmaʿ of the Ummah and whosoever opposes this will not be considered in any way.[14]

• *Tarawih prayer is 20 rakʿah long*
Imam Muwaffaq al-Din ibn Qudamah al-Maqdisi (d. 1223 CE), the leading Imam of the Hanbali school of thought in his time has declared in his fiqh book, *al-Mughni* 1/803: "There has been the Companion's consensus (*Ijmaʿ us-Sahabah*) on 20 rak'ahs of Taraweeh."[15]

• *Interest is prohibited*
All the schools of thought of Muslim jurisprudence hold the *unanimous view* that *riba*, usury and interest are strictly prohibited.[16]

• *Intentionally missed prayer must be made up*
There is consensus (Ijmaʿ) of the scholars whose opinion counts that whoever leaves a prayer intentionally must make it up.[17]

• *Women's leadership is prohibited*
There is "Ijmaʿ" (consensus of opinion) among the Ummah that female leadership is not permissible. Ijmaʿ is the third most important source of Islamic law and cannot be opposed.[18]

• *The Prophet's burial ground is the most holy place*
According to the consensus (Ijmaʿ) of all the scholars, the piece of land on which rests the blessed body of the Messenger of Allah is more virtuous than anything and everything which includes the Kaʿbah and the throne (ʿ*arsh*) of Allah Most High.[19]

• *Talfiq (mixing of opinions of different madhhabs) is invalid*
Among the things to note is that the *fuqaha'* have said that *talfiq* (piecing together the opinions of more than one *mujtahid* in one action) is

invalid by scholarly consensus (Ijmaᶜ). This is transmitted by Ibn ᶜAbidin, and Qasim ibn Qutlubugha of the Hanafis, and Ibn Hajar al-Haytami of the Shafiᶜis.[20]

• *Tahiyyatu al-Masjid prayer is a Sunnah*

It is mentioned in *al-Halbah* (of Ibn Amir Hajj al-Halabi): Scholarly consensus (Ijmaᶜ) has been mentioned about the prayer of greeting the mosque being a sunnah.[21]

• *Wiping over socks during travel is allowed*

Al-Nawawi states "All those who qualify for Ijmaᶜ (consensus) agree that it is allowed to wipe over the socks – during traveling or at home, if needed or not – even a woman who stays at home or a handicapped person who cannot walk can do so."[22]

• *Slaughtering without mentioning Allah's name is not lawful*

The great Hanafi jurist, ᶜAllamah Ibn ᶜAbidin explains the above by stating: "Meaning a slaughtered animal will not be lawful to consume (halal) if the name of Allah was intentionally not pronounced whether the slaughterer was a Muslim or from the people of the book (*kitabi*), because of the (clear) text of the Qur'an and the consensus (Ijmaᶜ) of all the scholars."[23]

• *Marrying women beyond Ahl al-Kitab is not acceptable*

All Muslim jurists are unanimous (Ijmaᶜ) that the Qur'an's permission to Muslims to marry the women of the People of the Book (*Ahl al-Kitab*) is applicable to Jewish and Christian women only and it cannot be extended to any other group.[24]

• *Abu Bakr's election*

In the Hanbali view the only real Ijmaᶜ which occurred other than agreement on religious belief was when the infant Muslim community elected Abu Bakr as the first Caliph following the death of the Holy Prophet.[25]

• *Imam Abu Hanifah was misguided*

Muhammad ibn ʿAbdullah al-Maliki said "I heard Abu Bakr Subjistani telling his followers that 'What do you say when to a Fatwa on which Imam Malik, Shaafi, Imam Auzai, Hasan bin Saleh, Safyan Suhri and their respective followers have an Ijmaʿ?' They [his followers] said that it must be the most correct ruling. Abu Bakr Subjistani then said that these individuals have an Ijmaʿ that Abu Hanifa is evil and misguided."[26]

• *Ijmaʿ against Imam Ibn Taymiyyah*

Ibn Taymiyyah was put in jail by the agreement of the Muslim scholars of Egypt and ash-Sham. His imprisonment came as a result of the Ijmaʿ of the scholars of his age.[27]

• *The Isra' (miʿraj) was in body and soul*

There is scholarly consensus (Ijmaʿ) that Prophet Muhammad journeyed in body and soul the night of *al-Isra'* from Masjid al-Haram in Makkah to Masjid al-Aqsa in Jerusalem. Moreover, these scholars indicated the person who denies *al-Isra'* is a blasphemer for belying the explicit text of the Qur'an.[28]

• *Kissing the thumbs during the adhan*

As Sayyid Alawi al-Maliki reported in his dedicated treatise on the rules concerning the use of weak Hadiths, the *Manhal Latif*, that scholars of the four law-schools (*madhhab*) concurred by Ijmaʿ (Consensus) – and that this Ijmaʿ was recorded from the time of the *Mujtahid* Imam, Ahmad ibn Hanbal until now – that any Hadith which are *daʿif* (as long as it is not *Mawduʿ*), can be acted upon for the *Fada'il al-Aʿmal*. [29]

• *What to Eat at the Point of Starvation*

Al-Ghazali deals with a strange hypothetical case and Nyazee presents it as the following:

> The case is that of a number of people in a boat who are cast out at sea and are about to die from hunger. They cast lots to choose one of their companions who will be killed and his flesh will be eaten so that the others are

> saved. For legality, this requires a *gharib* rule that is rejected by the *shari'ah*, because it does not meet the three additional conditions imposed by Al-Ghazali.
>
> *First*, though it is obligatory on the people in the boat to save their lives even if they have to consume *haram*, they cannot kill someone else to do so. The reason is that killing another person is prohibited without legal justification. Saving themselves by killing one whose life the *shari'ah* protects is not a purpose defended by the *shari'ah*. In other words, it is not *daruri*. *Second*, the people in the boat are not sure that they will be saved even if they consume the flesh of the person they kill. It is possible that they will stay at sea and will not be saved. The issue is, therefore, not *qat'i*. *Third*, and this most important, the issue concerns only a few individuals in the boat and not the entire Muslim Ummah. It is, therefore, not *kulli* and, thus, cannot be a public interest.
>
> Killing of one individual here cannot be permitted by the *shari'ah* as the issue fails to meet the additional conditions identified by Al-Ghazali. The interest of these individuals is thus rejected.[30]

As Nyazee's explication demonstrates precisely how Islamic laws and codes have been legalistically overstretched such that fundamental values whether from an Islamic or a human viewpoint are ignored. Moreover, what people might do in dire circumstances cannot be accurately predicted and codified. If some people actually faced a situation of this nature and sought an opinion from the jurists this would be one thing. However, if the opinion was merely the product of speculative, juristic argument over imaginary situations then this is unacceptable (contradicting the juristic principle that states verdicts should be confined to real as opposed to speculative situations).

In essence, a juristic position of this nature violates the fundamental human dignity upheld by the Qur'an [No. 1 Value discussed in Chapter Two]. Killing another human being to eat to save one's own life even in dire need cannot be considered to fall within the acceptable domain of human considerations. To kill another human being in order to eat to save a life is clearly a perversion of justice, morality and basic human decency. In this situation, the sacrifice of one's own life

for others – even sinners, persons not of the Muslim faith, or enemies – is the correct action. Overall then, evidence for a consensus of juristic agreement on this issue is sorely lacking, as adduced from the writings of other scholars: "If a body of persons dies of hunger, it is not lawful for them to eat the flesh of anyone of them to save their lives, for the *maslahah* (i.e. public interest) is partial and not total."[31]

While not all the quotes above originate from scholarly sources, the common application of Ijma^{c} is all too apparent. Sadly, the cited passages illustrate the tendency for Ijma^{c} to be abused nearly as much as it is used since in most cases a consensus does not, in fact, exist. In many cases, people possess an impression based on erroneous, unwarranted or false claims. Imam Ibn Taymiyyah warned of this:

> Ijma means that all the Ulama of the Ummah have agreed upon a certain point. And when it is established on a certain legal point, then it is not rightful for any person to refuse to accept that. This is so because the entire Ummah cannot have consensus on error. But *there are many problems about which people think that there is Ijma on them, while in fact there is none. Rather in some cases even the opposite view is correct and is upheld*.[32]

It has been a common practice among Muslim scholars and jurisprudents to claim consensus (Ijma^{c}) about almost anything they have given their juristic opinion on. The very use of the word Ijma^{c} inspires awe among the pious. However, the reality is that Ijma^{c} is a rare occurrence; some might argue that more often than not it is nothing but a mirage. As AbuSulayman points out except in a few basic matters, there is hardly any consensus at all:

> Ijma ... is meant to be applied in cases where there is no *nass* (text) from the Qur'an or the Sunnah to decide the *hukm* (rule). ... The only agreement among jurists based on Ijma concerns the prayers being five times a day, the obligation of zakah, etcetera. These subjects, however, are backed by the Qur'an and Sunnah and the Ijma of the companions of the Prophet (pbuh); they are, in fact, common knowledge. Beyond these fundamentals, *no absolute consensus has been reached on any issue*. There is continued controversy in the different schools of jurisprudence.[33]

> The gap between the theory and practice of Ijma is reflected in the difficulty that many jurists have acknowledged to exist in implementing its theoretical requirements. The absolute terms of the classical definition of Ijma have hardly been fulfilled by conclusive factual evidence that would eliminate all levels of *ikhtilaf*. *Ijma has often been claimed for rulings on which only a majority consensus had existed within or beyond a particular school.* The proof and authenticity of Ijma has, on the other hand, not received the kind of attention that has been given to the authentication of Hadith through a reliable isnad.[34]

Let alone in the case of Ijmaᶜ, using any of the extant definitions of the term, broad agreements are also quite uncommon. To appreciate this statement, consider the case of the Hanafi school, where two disciples, Imam Muhammad and Imam Abu Yusuf, played a vital role along with Imam Abu Hanifah, the founder, in shaping the school. Going through al-Marghinani's *Hedaya*, one of the leading texts of Hanafi fiqh based on classical sources, it is possible to pick a topic almost at random to see how frequently even the three elders of the Hanafi school of fiqh (Imam Abu Hanifah and his two disciples) disagree on various issues covered there.[35]

(III) IJMAᶜ: DEFINITION AND LACK OF CONSENSUS

The problem with Ijmaᶜ begins with the definition of the term. There is no Ijmaᶜ (consensus) on the definition of Ijmaᶜ (consensus). Careful scrutiny of the literature bears this point out.

Interestingly, the issue of the definition of Ijmaᶜ was not raised until the time of Imam Shafiᶜi (d. 820 CE). Even the tenth century scholar Abu Bakr al-Jassas (d. 980 CE) did not provide a definition. By the end of the tenth century attempts by various scholars to deal with the definition of Ijmaᶜ begin to appear. These are discussed in detail by Hasan (2003).[36]

- Abu al-Husayn al-Basri[37] (d. 1085 CE): "*Agreement of a group* (*jamaᶜah*) on a certain matter by action or abandonment."
- Imam al-Ghazali (d. 1111 CE): "*Agreement of the community* of Muhammad on a religious point."

• Al-Amidi: (d. 1233 CE): "*Agreement of all the people of binding and loosing*[38] who belong to the community of Muhammad, in a certain period of time, on a rule about a certain incidence."

Based on the various definitions of the term, four broad aspects of an Ijmaʿ can be identified. Interestingly, there is no consensus about any of these four aspects either:

(i) Whose agreement constitutes Ijmaʿ?
(ii) What competence should the constituent group minimally have?
(iii) What time period does an Ijmaʿ cover?
(iv) What subject matters fall within the scope of Ijmaʿ?

At this point, it is worthwhile exploring in greater detail whose agreement it is that constitutes an Ijmaʿ.

> According to the orthodox view, Ijma is the unanimous agreement of the community or of the scholars.[39]

Notably, the traditional view above fails to agree on whether it is the consensus of the entire community or the consensus of the scholars that is specified. According to Imam Shafiʿi, an Ijmaʿ is not an Ijmaʿ unless it is of the *entire* community. In the introduction to Majid Khadduri's translation of Shafiʿi's *Risalah* the following is mentioned:

> By Ijma (consensus) Shafi'i does not mean merely the agreement of a few scholars of a certain town or locality, as the Hijazi and Iraqi jurists seem to have held, but the majority of leading jurists in Muslim lands. He also universalized Ijma on matters of fundamentals to include agreement of the Muslim community. On matters of fundamentals arrived at by consensus, Shafi'i argues, there should be no disagreement (*ikhtilaf*), but on matters of detail for which there may be two answers, one answer might be chosen by *istihsan* (discretion or preference). The earlier jurists seem to have permitted a greater degree of discretion than Shafi'i was inclined to accept.[40]

Imam Malik, Imam al-Ghazali, and Ibn Hazm (Zahiris) held very different opinions on the term:

> To Malik, Ijma is of the companions of the Prophet and their successors residing at Medina.[41]

> Malik ... recognized the Ijma of the scholars of his own locality — Madina.[42]

> Shafi'i's doctrine of the community at large was opposed by other scholars, including his own followers, although Ghazali ... tried to confine the agreement to fundamental principles, leaving matters of detail to the consensus of the scholars. The fundamental weakness in the doctrine of the consensus of the community was procedural – the lack of an adequate method which would provide means for the community to arrive at an agreement.[43]

> To the Zahiris, valid Ijma was consensus of the Companions of the Prophet.[44]

> Ibn Jarir Al-Tabari and Abu Bakr Al-Razi regard even a majority decision as Ijma.[45]

And according to Ibn Taymiyyah:

> Ijma means that all the Ulama of the Ummah have agreed upon a certain point.[46]

The Zahiris as well as Imam Ahmad ibn Hanbal confine Ijma^{c} to the consensus of the Companions [*Ijma^{c} al-sahabah*] alone. Interestingly, some proponents of the *Khilafah* (Caliphate or Islamic State) in modern times propose *Ijma^{c} al-sahabah* as part of the constitution. In his book *The System of Islam* [*Nizam al-Islam*], Taqiuddin al-Nabhani includes a draft constitution for the *Khilafah* or Islamic State:

> Article 12: The only evidences to be considered for the divine rules (*ahkam shara'iah*) are: the Qur'an, the *Sunnah*, the consensus of the Companions (*Ijma as-sahabah*) and analogy (Qiyas). Legislation cannot be taken from any source other than these evidences.[47]

While it is generally agreed that Islamic laws are drawn from four foundational sources, which include Ijmaʿ, to specify Ijmaʿ as *Ijmaʿ al-sahabah* is simply untenable as there is no consensus about the definition of Ijmaʿ nor should such matters be so narrowly specified in a constitution, in exclusion to all other possible meanings or definitions. The case can be made that there are some things on which there have been *Ijmaʿ al-sahabah*,[48] and there is also a theological or intellectual case that *Ijmaʿ al-sahabah* is the only valid Ijmaʿ, but since a constitution is a legally binding document or contract, limiting Ijmaʿ to *Ijmaʿ al-sahabah* alone and then elevating it to the level of a dogma in its narrow or restricted form is unwarranted.[49] What about all those who disagree with this position (and, indeed, the preponderance of the opinion of the scholars is such that it does not restrict valid Ijmaʿ to *Ijmaʿ al-sahabah* only)? Indeed, constitutionalizing such dogmas by a state, in the presence of such significant difference can be a dangerous proposition.

Furthermore, this view leads to hardly anything more functional and useful either. The reason being that the Companions did not display a high level of consensus on a wide variety of issues so as to qualify these as Ijmaʿ (*Ijmaʿ al-sahabah*). Even though Imam Shafiʿi accepts the validity of Ijmaʿ, he clarifies:

> I would accept the opinion [of a Companion] if I did not find anything about it in the Book, or established sunna or consensus, or anything of similar meaning that would decisively support it, or any analogical deduction. *But one seldom finds an opinion of one Companion that is not contradicted by another.*[50]

The above exposition leads to the conclusion that there is no real agreement over the foundation of the third source of Islamic jurisprudence, Ijmaʿ, even though, according to some commentators, it is held to have precedence over the Qur'an, Sunnah and *Qiyas*, due to its definitiveness. Despite this, in traditional discussions about the subject, after mentioning the irreconcilable juristic differences, the general conclusion drawn is just the opposite of what is expected or warranted:

> The above discussion clearly shows that the Ijma and the majority decision of the Ummah on a certain interpretation of *nass* or on a certain Qiyas, ijtihad, or expediential legislation do constitute law and are *deemed to be authoritative* in Shariah. If such a law has been enacted by the men of learning and authority in the world of Islam, it is binding on all the Muslims of the world and if it has been enacted by those of any one country or region, then it will hold good for them alone.[51]

Clearly, nothing appears to undermine the position of Ijmaᶜ as a final authority in the eyes of the entrenched commentator. So far only the first aspect of Ijmaᶜ, which deals with defining who it is that constitutes a consensus, has been discussed and there is a serious lack of agreement by the scholars on this. When the other three aspects are investigated, the issues become still more divergent. Yet, the traditional claim about the authoritativeness of Ijmaᶜ remains unabashed:

> All agree that Ijma is a final authority. This means that when the Ijma has been arrived at on a certain interpretation of a *nass* or on a certain ijtihad, Qiyas or expediential legislation, then such an Ijma is binding on all and must be followed. Differences arise only as to the question whether there has been an Ijma on [a] certain legal point or not. No one challenges the authority of Ijma as such. The controversy hovers round the point: *whether it has been arrived at or not*![52]

> ... the concept of Ijma as a legal indicator, *dalil*, carries very nearly the same authority as the revelational sources [i.e., the Qur'an and the sunnah] themselves.[53]

Others have gone further, unacceptably elevating Ijmaᶜ to the level of revelation:

> [T]he classical jurists presumed the laws laid down by Ijma to be what God intended and so considered as a revelation from God.[54]

(IV) THE LIMITATION OF IJMAᶜ AS A SOURCE

It is important to note that, as for most issues pertaining to Ijmaᶜ, there is no consensus about what source its authority is derived from. Some

scholars attempted to identify the relevant sections of the Qur'an that support its status as one of the final authorities of Islamic jurisprudence. Many verses have been cited as evidence (*dalil*) for Ijma^{c} constituting an authority. Discussion of these is beyond the scope of the present work, however, a thorough review of the subject is covered by Hasan (2003). Unfortunately, these efforts have not been convincing and there are notable scholars who have countered the claim that Ijma^{c} is a concept based on Qur'anic sanction:

> Ijma has been justified on the basis of the Qur'an, Sunnah and reason. The jurists almost agree that *the Qur'anic verses, which are adduced to justify Ijma, do not clearly prove its authority*. The traditions of the Prophet have been quoted copiously in its support. These traditions constitute an evidence, according to the jurists, more explicit and potent than the Qur'anic verses.[55]

> Ulama have on the whole maintained the impression that the *textual evidence in support of Ijma does not amount to conclusive proof*. Having said this, one might add that both Al-Ghazali and Al-Amidi are of the view that when compared to the Qur'an, the Sunnah provides a stronger argument in favour of Ijma.[56]

Since neither the Qur'an nor the Hadith can be convincingly established as the source or basis for Ijma^{c}, the question remains unanswered is there any basis for Ijma^{c}'s authority? Some leading scholars have tried to establish fallible human reasoning for the infallibility of Ijma^{c} as an authoritative foundation of Islamic jurisprudence. However, even this attempt has not been successful either. As summarized below, after scrutinizing all the possible alternatives, Imam al-Ghazali throws up his hands and asserts that maybe its validity rests simply on customary norms. In other words, Ijma^{c} is accepted and recognized not because of the Qur'an or Hadith, but because Muslims have accepted it as a customary standard:

> Although orthodoxy put its heart and soul in defending Ijma on traditional and rational grounds, it could not convince the opponents. Even some jurists from among the exponents, like Al-Jassas and Al-Bazdawi, doubted

> the infallible character of the community on the basis of pure human reason. ... Al-Ghazali, though he strenuously defends Ijma on traditional, rational and factual grounds, seems to be dissatisfied with these arguments. He has recorded in al-Mankhul his clear-cut verdict that Ijma can be defended only on customary norms. He remarks: 'There is no hope of justifying Ijma on the basis of reason. Authorities based on revelation such as mutawatir traditions and the textual evidence from the Qur'an do not support it. Substantiating Ijma by Ijma is incoherence. Speculative analogy has no place in the decisive sources. These are the only essential principles of law. There remains no other principle except customary norms (*masalik al-'urf*). We might have acquired this doctrine by means of this source.'[57]

Why the preoccupation and fascination of Muslim scholars and jurisprudents with Ijmaᶜ? The reason is simple: whatever the definition, it is considered an incontrovertible source (*dalil*) for any pertinent issue or matter:

> Only Ijma can put an end to doubt, and when it throws its weight behind a ruling, this becomes decisive and infallible. Ijma has primarily been regarded as the instrument of conservatism and of preserving the heritage of the past. ... Ijma enhances the authority of rules that are of speculative origin. Speculative rules do not carry a binding force, but once an Ijma is held in their favor, they become definitive and binding. ... Lastly, Ijma represents authority. Once an Ijma is established it tends to become an authority in its own right, and its roots in the primary sources are gradually weakened or even lost.[58]

The most commonly quoted Hadith adduced in support of Ijmaᶜ is: The Prophet said: "My community (Ummah) will not agree on an error."[59] Variations of the same hadith have also been reported in other collections, such as *Jamiᶜ al-Tirmidhi* or *Musnad Ahmad*.[60] Of course, by implication, if the community does agree on something, i.e., a consensus is attained, it is infallible, and thus incontrovertible.

But a fundamental problem with the above or other *ahadith* mentioned in support of Ijmaᶜ[61] is that the traditions in question are not *mutawatir* and thus do not yield certainty of knowledge,[62] either in

terms of the actual text or their meaning and implication. In reality, let alone corresponding to the certainty generated by a *mutawatir* hadith, this is what is explained in *Sunan Ibn Majah*:

> According to al-Zawaid, its isnad contains in it Abu Khaif al-A'ma and his name is Hazim b. 'Ata who is *daif*.[63]

Interestingly, the Hadith above also has an ending: "When you see some difference, it is incumbent upon you to adhere to the great majority (*as-sawad al-aʿzam*)." The first and second sentences of the hadith point to a serious discrepancy. While the first sentence states that the Ummah will not agree on an error, the second advises one to adhere to the majority in case of dispute. However, it is clear that the issue of infallibility, if at all, is bestowed on the Ummah, *not* on the majority or on the scholars or any specialized or narrower group of Muslims. Neither does it indicate any specific time period or generation. Thus, it should not be difficult to discern the reality that there are not many issues on which the Ummah – the entire Ummah, beginning with the generation of the Companions continuing through subsequent generations – has a consensus.

There are also notable scholars who have rejected this Hadith *as the basis for Ijmaʿ*. According to al-Shawkani "As to the tradition 'my community will not agree on an error' and similar other traditions, it should be noted that the Prophet in these traditions had predicted that a section of his community will continue to hold to the truth, and prevail over other opposing groups. This tradition is not relevant to Ijmaʿ. The other traditions emphasize the unity and condemn separation from the community. They do not show that Ijmaʿ is in itself an independent legal source in the presence of the Qur'an and the Sunnah."[64] Shah Waliullah Dehlawi (d. 1762 CE) also echoes al-Shawkani.[65]

There is yet another important reason why the scholars have all too commonly laid claim to Ijmaʿ operating; only *mutawatir* hadiths yield certainty of knowledge concerning exactly what the Prophet has said or done, however, except in the case of a few narrations (maybe less than merely a dozen), most are not *mutawatir* (instead the vast majority are *ahad*; meaning, solitary narrations) and even if authentic (*sahih*)

their actual status is *probabilistic* to varying degrees.[66] Thus, if Ijmaᶜ (as an infallible source) can be claimed on any matter it commands much greater respect and adherence:

> With the popularization of traditions (Hadith) towards the end of the second century of the Hijrah there arose a conflict between the agreed practice and the isolated traditions. The Mu'tazilah objected to the traditions which ran counter to the Qur'anic teaching and the generally recognized practices. On the basis of this criterion they frequently charged orthodoxy with accepting solitary traditions and deviating from the established practice of the community, i.e. Ijma. This shows the paramount role of Ijma which it played in the formulation of law and dogma in Islam. In view of the supreme importance of this doctrine, Ibn Qutaybah, in his answer to the criticism of the Mu'tazilah, defends Ijma instead of solitary traditions. He remarks: 'We believe that *truth is established on the basis of Ijma more than on the basis of tradition (riwayah)*. This is because Hadith is subject to oblivion, interpretation, abrogation and the qualities of reporters. Hadith sometimes states contradictory rules which are correct in different contexts. ... But *Ijma* is immune to all these suspicions. ... Even traditions with a perfect chain were not sometimes literally followed by the community.'[67]

Indeed, there are other notable scholars, such as the important scholar of *Usul al-fiqh*, al-Amidi, who had conscientiously reached the conclusion that even Ijmaᶜ is *probabilistic*:

> Amidi seems, when all is said and done, to belong to the camp of those who saw the Ijma as functioning as a probable indicator of the law, one that could yield nothing more than opinion. True, he seems, on the issue of the authority of the Ijma, to try to straddle the fence between the two camps by affirming the *near* conclusiveness of the supporting Qur'anic and Sunnaic texts, especially the latter. But near conclusiveness is not, from a technical point of view the same thing as conclusiveness, and Amidi finds himself constrained in the end to let the absolute authority of the Ijma rest upon probability. This being the case, he has no choice but to regard the Ijma *as actually operating as a probable indicator dependent upon the fallible deliberations of the individual mujtahid*.[68]

Based on such fundamental problems with the doctrine of Ijmaᶜ, Imam Hazm (who defines Ijmaᶜ as the consensus of the Companions) argued that:

> *the Ijma on a large number of legal questions generally claimed by the scholars is not correct*. Some of them are definitely disputed, and others are open to suspicion.[69]

The dialog between Imam al-Shafiᶜi and his interlocutor in the *Risalah* is quite illuminating in this context:

> 633: He [i.e. the interlocutor] said: Is not an opinion agreed upon in Madina stronger than a narrative related by an individual? For why should he relate to us a weak narrative related by one individual and refrain from relating to us a stronger and binding matter agreed upon [among the scholars]?
>
> 634: [Shafi'i] asked: Supposing someone should tell you: It is because the narrative is rare and the agreement [about the matter] is too well known to be related; and should you yourself say: This is a matter agreed upon?
>
> 635: He [the interlocutor] replied: Neither I nor any of the scholars would say: 'This is [a matter] agreed upon,' unless it were [a matter] about which you would never find a scholar who would not repeat it to you and relate it from a predecessor, such as that the noon-prayer has four [cycles, rak'as] and that wine is forbidden, and the like. I sometimes find one who says: 'The matter is agreed upon,' but *I often find scholars in Madina who say the opposite, and I find that the majority [of scholars] of other cities oppose what is said to be 'agreed upon.'* [70]

It is reported that Imam Ahmad ibn Hanbal, founder of one of the four traditional schools (*madhhab*) made a general assertion:

> Whoever claims consensus is a liar.[71]

The argument of Imam Ibn Hanbal is that one may claim there is no known case of disagreement or dissent, but a positive claim of Ijmaᶜ (consensus) is simply not tenable without appropriate evidence.

Below, for example, is a summary of the various issues pertaining to Ijma^{c} (consensus) on which there is no Ijma^{c} (consensus).

	Subject	Is there an Ijma^{c}?
1	Definition of Ijma^{c}	**No Ijma^{c}** on this
2	Whose agreement?	**No Ijma^{c}** on this
3	What should be the competence of the constituent members?	**No Ijma^{c}** on this[72]
4	What period is covered by an Ijma^{c}?	**No Ijma^{c}** on this[73]
5	What is the scope of the subject matters of Ijma^{c}?	**No Ijma^{c}** on this[74]
6	Source of Ijma^{c}'s authority (Qur'an, Sunnah or Ijma^{c})?	**No Ijma^{c}** on this
7	What is the meaning and scope of Ummah or *Jama^{c}ah*?	**No Ijma^{c}** on this[75]
8	What is the meaning of *dalal* or *khata'* as in the pertinent Hadith that serves as basis for the doctrine of Ijma^{c}?	**No Ijma^{c}** on this[76]
9	Is the doctrine of Ijma^{c} more justified by textual sources or rational reasons?	**No Ijma^{c}** on this[77]
10	Was the selection of Abu Bakr as the *Khalifah* an Ijma^{c}?	**No Ijma^{c}** on this[78]
11	Are the matters of creeds and dogmas within the scope of Ijma^{c}?	**No Ijma^{c}** on this[79]
12	Are worldly affairs covered by the scope of Ijma^{c}?	**No Ijma^{c}** on this[80]
13	Does Ijma^{c} have to be on the basis of positive expression or can it be by silence (of some)?	**No Ijma^{c}** on this[81]
14	Once an Ijma^{c} is reached, can it be modified or changed in the future based on new or further evidence?	**No Ijma^{c}** on this[82]

(V) MODERN PERSPECTIVES ON IJMA^{C}

The emergence of *madhhabs* (schools of jurisprudence) followed by the recognition of a few of these as constituting traditional schools represents a systematization of both the methodology and corpus of laws,

codes and dogmas. The doctrine of Ijma^{c} played a vital role in this process. Diversity of thought and room for disagreement can represent dynamism in certain respects. However, it was deemed desirable that broad agreement or near-consensus should crystallize in each *madhhab* concerning various aspects of worship and rituals. Clearly, this does not mean that issues concerning whether *tarawih* prayer corresponds to 8 or 20 units, or whether *amin* should be said aloud in congregational prayer, have been resolved across the *madhhabs* even over the course of fifteen centuries. Also, while the systematization of laws and codes had an integrative effect, it has also contributed toward rigidity and even intolerance at the inter-*madhhab* level. For example, although according to the Hanafis, a marriage between a Hanafi male and a Shafi^{c}i female is valid, according to the Shafi^{c}i school it is invalid.[83] While Ijma^{c} has been pivotal in enhancing integrative effects at the level of the *madhhab* with regard to matters of rituals and worship, the corpus of Islamic laws and codes has become inconsistent not just with the contemporary era, but also with the very principles and values of Islam that such laws and codes are supposed to uphold:

> That Muslims are not duty bound to be permanently bound to former Ijma is not a new or modern position. 'This principle has been propounded by the famous Hanafi jurist Abu Al-Husr Al-Bazdawi in his book *Usul al-Fiqh* [Principles of Jurisprudence]. Al-Bazdawi belongs to the fourth and fifth century of the Hijrah. This work is a great contribution to Islamic jurisprudence. It is on account of his statement that we can say that consensus cannot become a source of difficulty for us. If a consensus is reached on some issue and it is found subsequently to be unsuitable the possibility remains that we may change it through reasoning and create a new one canceling the old consensus.'[84]

Over recent centuries the classical definition and treatment of Ijma^{c} has been either rejected or challenged almost consistently, with an effort to bring the doctrine into conformity with the realities of the modern age and in accordance with the spirit and vision of Islam. Muslim scholars and the intelligentsia in recent times have not discarded the concept of Ijma^{c}, but have instead sought to reinstitute it in a practicable way. Sayyid Ahmad Khan (d. 1898 CE) "believed that Ijma was

confused with custom by the masses who were following custom in the name of Ijma."[85] He recognized the validity of Ijmaᶜ if appropriately supported by textual evidence. However, he also held that:

> [T]he doctrine of Ijma was a progressive concept. It should march with the time to solve fresh problems. Hence sometimes he invalidated even the Ijma of the Companions on a certain point contending that a fresh Ijma should be substituted for it in view of the change of circumstances.[86]

Muhsin al-Mulk (d. 1907 CE) and Ubayd Allah Sindhi (d. 1943 CE) are among those who have tried to redefine or reinterpret Ijmaᶜ.[87] Muhammad Iqbal (d. 1938 CE) is among those who have taken the modern discourse on Ijmaᶜ to a new height:[88]

> The revision of Islamic jurisprudence in the light of the modern situation prevailing in the Muslim world is the principal aim of Iqbal. He thinks a deeper study of Islamic law will frustrate the advocates of the view that Islamic law is stationary. The classical Fiqh of Islam requires critical discussion, though this will offend most of the orthodox Muslims. Fiqh should be changed in view of the change of circumstances. The founders of Fiqh never claimed finality of their views. The fundamental legal principles are to be interpreted in the light of the experience of [the] modern Muslim generation. ... He believes that the transfer of power of ijtihad to a Muslim legislative assembly is the only possible form of Ijma in modern times. This will also secure contribution from laymen who possess insight into affairs.[89]

Among others from within the reformist trend was Muhammad Abduh (d. 1905 CE), former Rector of al-Azhar in Egypt. He also rejected the interpretation of commonly quoted Hadiths as forming the basis for determining the authoritative position of Ijmaᶜ in Islamic jurisprudence.[90] He regarded the classical definition of Ijmaᶜ as erroneous and impracticable, stating that:

> Ijma means the consensus of the whole Muslim community in a particular generation.[91]

He also emphasized the term '*uli al-amr* (those in authority), suggesting that it was the men in authority who should be elected by the people from the community themselves.[92] Al-Sanhuri too emphasized the importance and relevance of Ijma^{c} for the development of a "representative government."[93]

One of the primary impetuses behind challenging and reinterpreting the doctrine of Ijma^{c} in the reformist line is the fact that:

> Ijma played a vital role in closing the gate of ijtihad. The agreed decisions of the second and third centuries were irrevocable. Ijtihad was exercised on points not yet settled by Ijma. This continued in every generation; the scholars of subsequent generations commented on or explained the decisions of the early generations. Henceforth the gate of ijtihad was closed, though some scholars at various times claimed to be mujtahid. There is a certain analogy between the decisions taken on the basis of Ijma and those taken by the councils of [the] Christian church. Ijma in Islam became the touchstone of heresy.[94]

Ziauddin Sardar explains how the inclusive and participatory dimension of Ijma^{c} was lost and it became a tool for intolerance and exclusivism:

> ... the idea of Ijma, the central notion of communal life in Islam, has been reduced to the consensus of a select few. Ijma literally means consensus of the people. The concept dates back to the practice of Prophet Muhammad himself as leader of the original polity of Muslims. When the Prophet Muhammad wanted to reach a decision, he would call the whole Muslim community – then, admittedly not very large – to the mosque. A discussion would ensue; arguments for and against would be presented. Finally, the entire gathering would reach a consensus. Thus, a democratic spirit was central to communal and political life in early Islam. But over time the clerics and religious scholars have removed the people from the equation – and reduced Ijma to 'the consensus of the religious scholars.' Not surprisingly, authoritarianism, theocracy and despotism reigns supreme in the Muslim world. The political domain finds its model in what has become the accepted practice and metier of the authoritatively 'religious' adepts, those who claim the monopoly of exposition of Islam.

> Obscurantist Mullahs, in the guise of the ulama, dominate Muslim societies and circumscribe them with fanaticism and absurdly reductive logic.[95]

AbuSulayman aptly sums up the reformist tendency regarding Ijmaᶜ and other aspects of Islamic jurisprudence:

> The traditionalists consider Ijma the consensus of all *Mujtahidin*, which in the contemporary world boils down to the consensus of the authoritative 'ulama.' This view is no longer satisfactory. The ulama no longer necessarily represent the mainstream of Muslim intellectual and public involvement. Their system of education does not reflect the changes that are occurring in the world today. Their opinions therefore often only add to the already existing confusion. It is clear that the simple, traditional concept of Ijma is no longer suitable for a non-classical social system. Law and policymaking, especially in the field of international relations, involve complex techniques and considerations that are not susceptible to the old application of Ijma. It is also clear that Ijma on different subjects now requires the consensus of other segments of society. The application of Ijma can no longer be the exclusive prerogative of the professional Ulama. Moreover, in a rapidly changing world, the concept of permanent Ijma, particularly as regards the fluid area of international relations, is neither practical nor possible because of the space-time factor.[96]

Another important aspect pertinent to Ijmaᶜ that requires critical attention is that the process of Ijmaᶜ cannot be elitist and people whose lives are going to be affected by any decision or policy must be consulted in establishing an Ijmaᶜ*:*

> An Ijma done only by the *fuqaha* or the *ahl al-hall wa al-aqd*, even when it claims to be supported by the Qur'an and Sunnah, is certainly not binding on anyone and will not constitute law until it has been approved by the whole Ummah.[97]

Of course, it would be impractical for the entire Ummah to be directly involved in such a process of approval. But this is precisely where the principle of *shura* becomes relevant. Both *shura* and the issue

of Ijma^{c} have to be reconciled and integrated to devise a representation-based decision-making process, so as to provide functionality and dynamism:

> Some people believe that Ijma is the consensus of opinion of the learned Mujtahids only while some people believe that it is the consensus of all Muslims barring infants and lunatics. But, in fact, they are not alternatives, they are complementary to each other. They are different stages in the evolution of law. Firstly, technical experts do Ijtihad and try to come to consensus and then their opinion is to be submitted to *all people who are going to be affected by the application of law to them*. As law is to be applied to them, their consensus through their Ijtihad is rendered necessary. *If a man is to follow the law in action and if his activities are going to be governed by a particular law, his broad consent in its enactment in the normal circumstances is necessary*. … Technical experts of Islamic Fiqh and Jurisprudence even in the entire world can be consulted on a certain issue or issues, but *ultimately it should be put to the* Ijtihad *of people to whom this law is going to be applied*.[98]

Thus, a law does not become Islamic out of a claim of it conforming to an Ijma^{c}, which generally does not exist in any case. Instead, a law becomes Islamic when it meets *all* of the following conditions: (a) the formulation of the law must be rooted in the foundational sources of Islam, (b) it is derived with explicit attention to the *maqasid* and values of Islam, and (c) the adoption and enactment of the law by the society is through *shura*.

(VI) CONCLUSION

Ijma^{c} has been presented as a source constituting final authority in traditional Islamic jurisprudence. Unfortunately, as discussed in this chapter, there are serious problems concerning the functional use of this source. There is also no agreed upon textual basis for the doctrine in question. Although Ijma^{c} appears to have some redeeming features, this very much depends on whether it can be made to regain its dynamism (in terms of the prerogative of every generation to reach its own consensus) and to redefine its consultative-participatory role (in

terms of involvement of the pertinent scholars and experts, or the entire community, through elected bodies):[99]

> Ijma is not a matter of consensus of a number of experts or jurists. Its meaning and function should be worked out in relation to the legislative function in concrete political systems, where it may produce a workable relationship between the ideal and the real with maximum possible support and participation on the part of Muslim peoples.[100]

The goal of this work is not to assert that Ijma^{c} has not played some vital role in the history of Islam, or that it does not have any validity or relevance at all. Rather, it is to help drive home the point that Muslims neither need nor should claim divine sanctity for a concept that simply does not possess such agreed upon sanctity. Furthermore, as explained, there is hardly anything, except concerning a few broad and basic matters, on which there exists an Ijma^{c} or consensus. Thus, Muslims need to be circumspect in accepting any claim which presents as proof the validity of having an Ijma^{c}.

It also needs to be acknowledged that the cases where *Ijma^{c} al-sahabah* operates are rare and that even the claims of an Ijma^{c} in this respect are contested. However, if there is indeed a legitimate *Ijma^{c} al-sahabah* on an issue then it needs to be accorded the highest regard. However, the highest regard does not mean that any such claimed Ijma^{c} is binding forever. Similarly, Ijma^{c} of the scholars, jurists and experts carries special weight in certain respects and must be accorded weight as such. As long as Ijma^{c} is not approached from the perspective of infallibility, but rather from the viewpoint of functionality, all such definitions of Ijma^{c} can be valid and relevant if in legislation the three conditions mentioned above are met.

The scope of this chapter has been limited to accommodate an exploration of how to ensure that Ijma^{c} is relevant and functional to any contemporary time. While there are serious gaps in the doctrine of Ijma^{c}, it is undeniable that there has to be some integrative mechanisms, tools and institutions to bring functional and working agreement and harmony among Muslims. In this regard, Ijma^{c} as a classical Islamic doctrine may not be tenable at the present, but the concept has

relevance as a method and institution, which Muslims must find ways to make practicable. Thus, conscientious Muslims need to rededicate themselves to practicing Islam and living their lives according to a dynamic, problem-solving way, instead of blindly adhering to rigid dogma or self-indulgent legalism.

CHAPTER 5

Qiyas (Analogical Reasoning) and Some Problematic Issues in Islamic Law

THROUGHOUT the Muslim world there exists an ongoing tension between the forces of rigid conservatism and those of modernity and reform. At the core of this tension lies the corpus of Islamic law (fiqh) the bulk of which, many conscientious Muslims admit, has become asynchronous not only with the spirit and vision of Islam but also the contemporary challenges and realities facing Muslim society. Indeed, nations who have proclaimed themselves to be "Islamic," albeit superficially, by the institution and implementation of the traditional body of Islamic laws, have found that even those who are customarily staunch supporters of Islam – the common Muslim masses – are experiencing difficulty in coping with, if not understanding, the laws' detail which so often built on rigid or literal interpretation have to be accepted as given.

Accordingly, the negative impact for instance which the Hudood Ordinance of Pakistan has had on many women is a good indication of the injustice and cruelty which is perpetrated in the name of religion, but which in reality ignores the postulates and requirements of the Islamic faith.[1] It is hypocrisy at its most deplorable. Across the border in India things took such a frustrating turn, that Muslim women fed up with the All India Muslim Personal Law Board (an all male institution), took matters into their own hands by boldly establishing an All India Muslim Women Personal Law Board.[2] Meanwhile, Afghan society just recovering from the Taliban regime has created a quite different, but still more profound, nightmare by, for example, obliging men to

maintain their beards and women to completely shroud themselves in the traditional burqa, remain secluded at home and be deprived of any opportunity for serious work or study in the outside world.

While such extremes cannot be generally attributed to the work of our noble jurisprudents and scholars from the classical period it must be recognized that by the time the various schools of Islamic thought (*madhhab*) were formed and orthodoxy took shape Islam gradually fell victim to the effects of excessive legalism and literalism.

What is now commonly identified or understood to be representative of the Shari'ah, and which is commonly presented as something divinely sanctioned, is actually mostly composed of the interpretations of fallible human beings. This is so even though the human enterprise involved has been informed by the two primary Islamic sources, the Qur'an and Sunnah – the Qur'an constituting the direct, uncorrupted and infallible revelation of God, the Sunnah constituting the Prophetic Hadith narrations relied upon to deduce much of the detail of the law and its codes. Although the scholars of Hadith have performed a most invaluable service by establishing the Hadith collections and developing methods for their authentication, individual hadiths in themselves are neither divine nor infallible. Still more removed from a divine origin are the other two sources of Islamic law: Ijma' (consensus) and *Qiyas* (analogical reasoning):

> The Qur'an is the primary source of law. The other three sources, i.e., the Sunnah, Ijma and Qiyas have been stamped with the revelatory character. ... Qiyas derives its value from these sources; hence it is indirectly infallible.[3]

> Muslim jurisprudence (fiqh), for the systematic deduction of law, developed a methodology of its own to interpret and make deductions in line with the Shari'ah, for example, Qiyas (analogy), Ijma (consensus). ... The basic 'usul are four: Qur'an, Sunnah, Ijma and Qiyas. *The various schools of Muslim jurisprudence differ on the number of 'usul to be used or emphasized*, although all of them include the Qur'an and the Sunnah.[4]

Ijma' has been the most important integrative tool used to establish the sanctity of the Islamic laws and codes, including those based on

Qiyas. However, there is precious little related to the doctrine of Ijmaᶜ about which a consensus exists, as demonstrated in the previous chapter. The focus of this chapter, however, is *Qiyas*, the fourth source of Islamic fiqh and otherwise valid and useful tool of Islamic jurisprudence.

Muslims desire to follow Islamic law because the corpus of law and its codes represent to them (they are told and taught this) the correct Islamic guidance for the entire spectrum of life. However, even though they want to follow Islam and the laws that are presented to them as constituting Islam, they neither know how these are arrived at nor do they see the justice and problem-solving capabilities this guidance embodies. Many Muslims now give the traditional body of Islamic law the cold shoulder and there are others who even like to disavow many aspects of it. The source of the problem appears to be linked to *Qiyas:*

> The formalism and frequent use of *Qiyas* in law generated hatred towards this principle. There was a widespread disagreement among the jurists, especially among the Iraqis, as a result of the use of ra'y [opinions] and *Qiyas*.[5]

In many cases, when our Jurists confronted new situations, they successfully and effectively applied *Qiyas* to seek new solutions. As Muslims we all benefit from their precious and noble contributions in this regard. However, *Qiyas* has not been an unmixed blessing. In this chapter several aspects of Islamic law, that are illustrative of some of the key excesses arising from the application of *Qiyas* when applied in a legalistic and literalist manner, delinked from the goals (*maqasid*) and values of Islam, are explored.

(I) SOME PERTINENT BASICS OF QIYAS

Far from constituting a compendium of laws and codes, only a very small portion of the Qur'an relates to specific guidance establishing what is permissible and what is prohibited. Beyond establishing some basic principles, norms and parameters the commonly accepted

position of Islamic fiqh is that except what is categorically prohibited the default guidance of the Qur'an is permissibility. As al-Qaradawi explains:

> The first *asl'*, or principle, established by Islam is that the things which Allah has created and the benefits derived from them are essentially for man's use, and hence are permissible. Nothing is *haram* except what is prohibited by a sound or explicit *nas* (i.e. text) from the Law-Giver. ... He has prohibited only a few things for specific reasons, ... In Islam the sphere of prohibited things is very small, while that of permissible things is extremely vast. There is only a small number of sound and explicit texts concerning prohibitions, while whatever is not mentioned in a *nas* as being lawful or prohibited falls under the general permissibility of things and within the domain of Allah's favor.[6]

As the Prophet's life, reflected in his words and actions, is a model, Muslims turn to the Sunnah (authenticated by Hadith) for detailed guidance. Yet, neither the Qur'an nor the Sunnah/Hadith covers every situation that its adherents might encounter. This is where *Qiyas* or analogical reasoning – where "the root meaning of the word … is 'measuring,' 'accord,' and 'equality'"[7] – makes an appearance:

> Qiyas mean[s] to seek similarity between new situations and early practices, especially those of the Prophet.[8]

> The function of *Qiyas* is to discover the cause or *illah* of the revealed law so as to extend it to similar cases. Wine drinking, for example, is prohibited by explicit text. The cause for the prohibition is the intoxicating effect, hence in whatever this cause is found prohibition will become applicable.[9]

> ... no one at all should [give an opinion] on a specific matter by merely saying: It is permitted or prohibited, unless he is certain of [legal] knowledge, and this knowledge must be based on the Qur'an and the sunna, or [derived] from Ijma (consensus) and *Qiyas* (analogy).[10]

Qiyas is:

> part of Islamic Law ... that which is subject to modification according to the need and requirements of the changing times and it is this part of the

> Islamic Law which endows it with wide possibilities of growth and advancement and makes it fully capable of fulfilling all the needs of an expanding human society in every age.[11]

Gradually, *Qiyas* gained greater importance and assumed a more central role:

> Qiyas was recognised as a fourth source of law along with the other three sources. By and by, people began to depend on it extensively. Ultimately it overreached the Qur'an and the Sunnah.[12]

Some people suggest while others claim that there was an Ijma[c] among the Companions about the validity of *Qiyas* as part of the Muslims' toolkit to arrive at or deduce solutions involving situations that are not covered by the other primary sources, i.e., the Qur'an and the Sunnah:

> The companions were unanimously in agreement concerning the application of analogy.[13]

However, those reasonably familiar with Ijma[c] as a doctrine and a method, as demonstrated in Chapter Four, know that this claim of a Companions' consensus concerning *Qiyas* is simply untenable. It can be argued that many of the Companions applied what they knew to situations that were unknown yet similar to prior established positions, and thus in this way what was practiced amounted to *Qiyas*. However, to claim that the Companions of the Prophet knew this constituted *Qiyas*, deliberated accordingly and reached a consensus thereafter is difficult to find evidence for.

Indeed, those who want to establish the validity of everything using a text-oriented approach, through the identification and proffering of textual evidence, have tried to provide the relevant evidence from the Qur'an and Sunnah as the basis for *Qiyas* being one of the sources of Islamic fiqh.[14] There is no verse in the Qur'an that the scholars have been able to agree upon which can be clearly discerned as acting as the basis of *Qiyas*. Furthermore, the Sunnah, through the Hadith collections, has been offered to establish additional textual justification for

Qiyas. Once again, there is no agreed upon basis even though plenty of different examples abound which have been offered by different scholars.

Some Muslim scholars and groups, one such represented by the Zahiri school and its main protagonist Ibn Hazm, have rejected *Qiyas* altogether. Ibn Hazm's Zahiri approach is based on literalism and development of the explicit meaning of the textual evidences while shunning *Qiyas*. Nevertheless, there have been repeated attempts to justify *Qiyas* as being part of ijtihad. An oft-quoted hadith is narrated by Muʿadh ibn Jabal, who was sent to Yemen by the Prophet. According to the hadith, when the Prophet asked Muʿadh how he would judge a situation that was not directly addressed in the Qur'an or Sunnah. He replied: "I shall do my best to form an opinion and I shall spare no effort."[15]

Ibn Hazm, as well as some scholars from other persuasions, disputes this hadith:

> [Ibn Hazm] does not recognise the tradition of Mu'adh b. Jabal as sound. This is widely quoted by the exponents to justify *Qiyas*. He thinks that this tradition is known only through Abu Awn from Mu'adh, and its transmitter al-Harith b. Umar is obscure. Hence it is not dependable.[16]

Careful readers might be surprised to stumble upon chapter headings in *Sahih al-Bukhari* which read no less than: "What is said against judging (in religion) made on the basis of one's own opinion (i.e., *ra'y*) or by *Qiyas*" or "Whenever the Prophet was asked about something regarding which no verse was revealed, he would either say, 'I don't know' or give no reply, but he never gave a verdict based on opinion or on *Qiyas*."[17] In actual fact, at one stage, the opposition to *ra'y* or *Qiyas* was so strong that the chapter headings reflected Imam al-Bukhari's juristic view on this issue.[18]

Regardless of the opposition and disagreement among themselves the four traditional schools, representing the mainstream, helped *Qiyas* to emerge and serve as one of the predominant and most commonly employed tools of Islamic jurisprudence.

The relationship between Ijmaᶜ and *Qiyas* is a close one. While ijtihad ensures that Islamic jurisprudence is dynamic, it is the institution of *Qiyas* that has brought discipline to the general application of human reasoning to determine what is Islamically acceptable as opposed to what is not concerning things or situations that have not already been covered by the other three sources. However, for the result of an analogical deduction (*Qiyas*) to be broadly accepted, it also has to be validated by Ijmaᶜ. When validated, most Muslim scholars have placed a high value on *Qiyas* as a methodology:

> The procedure of analogy is devised to eliminate the free use of reason and independent value judgments.[19]

> There is an acute controversy among the classical jurists over the validity of Ijma on questions based on analogy (*Qiyas*) and individual interpretation (ijtihad).[20]

> Ijma has the authority to decide whether a certain opinion of the Jurist or a decision of a Judge is right or wrong. No *Qiyas* can attain the status of law unless it is authenticated by Ijma.[21]

(II) DIVERSITY OF VIEWS ABOUT QIYAS

Even though those who follow the four main Sunni schools of thought generally accept *Qiyas* as one of the four sources of Islamic jurisprudence there is considerable disagreement about what *Qiyas* constitutes, its scope, the method of its validation and so on:

> After the Companions, jurists differed over the extent to which analogy could be relied upon. ... The question of analogy has caused a good deal of controversy.[22]

Little consensus exists concerning *Qiyas*. Each school prefers its own definition, possessing its own special emphasis or nuance.

- *Qiyas* is defined by Hanafis as "an extension of law from the original text to which the process is applied to a particular case by

means of a common *illah*, which cannot be ascertained merely by interpretation of the language of the text."[23]

- To the Malikis, *Qiyas* is "the accord of a deduction with the original text in respect of the *illah* or effective cause of its law."[24]
- For the Shafiʿis it is "the accord of a known thing with a known thing by reason of the equality of the one with the other in respect of the effective cause of its law. To Shafi'i, *Qiyas* and ijtihad (interpretation) are two terms with the same meaning."[25]

The common denominator in all these cases involves identifying the ʿ*illah* (effective cause of the law; *ratio decidendi*). "It appears that the term *'illah* (effective cause) did not come into use in juristic reasoning up to the time of Shafi'i. It is not also traceable in the writings of the early schools of law. Shafi'i terms the common factor sometimes *ma'na* (idea) and at other times *asl* (basis). The term *'illah* must have been employed in the post-Shafi'i period."[26] Important differences in this regard are also notable. For al-Shafiʿi, *Qiyas* and ijtihad are synonymous, while for other scholars this is not the case.

Just as the consensus that *Qiyas* constitutes a valid methodology of Islamic jurisprudence does not exit, so are there similar problems concerning the consensus over what constitutes an ʿ*illah*, how it is derived and even how it is validated:[27]

> As can be expected, not all Muslim jurists accepted the validity of *Qiyas*, and even those who did held a variety of contradictory opinions regarding when its use was legitimate.[28]

In reaching conclusions about the unknown starting from the known, extending the frontiers of human knowledge and understanding to new situations, or in the derivation of solutions to problems not encountered previously, analogy is the most commonly employed tool of man's reasoning. Kevin Dunbar at Dartmouth University explains this accordingly:

> Analogy is a basic human reasoning process used in science, literature, art, education, and politics. Analogy can be used to make predictions, provide

> explanations, and restructure our knowledge. Analogy is also used to influence public opinion, fight battles, win wars, start and finish relationships, and advertise laundry detergent.[29]

Dunbar illustrates the application of analogy in modern science and points out that the method is by no means simple:

> Different researchers on analogy use different terminologies, however most researchers distinguish between two main components of an analogy – the *Source* and the *Target*. The Source is the piece of knowledge that one is familiar with. The Target is usually the less familiar piece of knowledge. When one makes an analogy, one *Maps* features of the Source onto the Target. In the case of the Earth-Mars analogy, the Source is the Earth and the Target is Mars. By Mapping features known about the earth onto Mars it is possible to make predictions about the types of features that will be found on Mars, such as water and life. Thus, analogy is a very powerful mental tool to discover new things. As well as distinguishing between the Source and the Target researchers in analogical reasoning often distinguish between *Superficial* and *Structural* features. Superficial features are things such as Mars being round or having a red hue. Thus, making an analogy between Mars and a red Stop sign would be an analogy based upon the feature red, which is a superficial attribute. Structural (or *relational features*) refer to the underlying sets of relations between features (first order relations), or relations among relations (second and third order relations). In the case of Mars, structural relations might be the Seasonal movement of dark streaks across the surface of the planet and the presence of dust devils. Noting these attributes and relations led to the hypothesis that these are the same as dust devils on earth and that the same mechanisms that produce dust devil trails on earth are what is happening on Mars (as you can see analogy can be complicated). The major virtue of analogy is that it allows a person to go beyond the superficial.[30]

Analogical reasoning has been quite useful in many scientific discoveries.[31] It is no surprise that the use of analogical reasoning is widespread in modern education and the GRE test for graduate admission in USA includes problems based on analogy. The relevance of analogical reasoning in such tests are explained as follows:

> In a deeper way, almost everything we do involves analogy. Analogical reasoning is not only the foundation for relating two objects, but, as we relate more and more objects to one another, we use some form of analogical reasoning to abstract larger concepts, rules, and formulate higher-order mental maps of the relationships between these concepts. Accordingly, as we might expect, the great teachers and innovators of psychological concepts exemplify this mastery of analogies and analogical reasoning.[32]

Thus, the fascination with, and the extensive use of, *Qiyas* by Muslim scholars is easily understandable and only natural. In a religious context though, an otherwise common tool of human reasoning takes on a sacred character. Be that as it may, it is important to bear in mind that *Qiyas* is essentially *speculative* (*zanni*):

> The jurist who resorts to *Qiyas* takes it for granted that the rules of Shari'ah follow certain objectives (*maqasid*) that are in harmony with reason. A rational approach to the discovery and identification of the objectives and intentions of the Lawgiver necessitates recourse to human intellect and judgement in the evaluation of *ahkam*. ... Since an enquiry into the causes and objectives of divine injunctions often involves a measure of juristic speculation, the opponents of *Qiyas* have questioned its essential validity. Their argument is that the law must be based on certainty, whereas *Qiyas* is largely speculative and superfluous. ... It is once again in recognition of this element of uncertainty in *Qiyas* that *the ulama of all the juristic schools have ranked Qiyas as a 'speculative evidence.'*[33]

> From an epistemological point of view, the most important feature of the judgments concluded through analogy by 'illa is their being disputable. This results not only from the fact that the 'illa, by means of which these judgments are arrived at, can never be fully established or shown to be true, therefore giving rise to different conceptions as to what constitutes a proper or acceptable 'illa.[34]

> ... all jurists concluded that *Qiyas* is a form of probabilistic (al-zann al-rajih) evidence. Other than the form of *Qiyas* in which the *'illah* is clearly identified in the texts, *Qiyas* is never deemed to be as high an authority as text or Ijma which are deemed as definitive or decisive evidences (*qat'i*).

> Rather, *Qiyas* is recognized as a probability the degree of which is measured by the 'proximity and harmony' with the textual authorities.[35]
>
> *Analogy (tamthil) entails probability*, which can be achieved by conjecture and imagination.[36]

The problem with *Qiyas* as a source methodology and authority in Islamic jurisprudence is that it is seriously compounded by a lack of agreement concerning the relationship between the *asl* (the original case) and the validity of *Qiyas*-based rules so derived:

> We may now discuss the conditions laid down by the jurists for the validity of the rule of law contained in the original case. Due to the lack of the early literature on the subject we cannot trace the origin of the conditions as developed in the classical period. Al-Jassas [d. 980 CE] does not deal with these conditions. He discusses legal cause (*illah*) in greater detail. Abu Ishaq Al-Shirazi [d. 1083 CE] mentions six conditions, Al-Ghazali [d. 1111 CE] and Al-Amidi [d. 1233 CE] give eight, Ibn Qudamah [d. 1223 CE] stipulates only two conditions, Al-Razi [d. 1209 CE] and Ibn Al-Hajib [d. 1249 CE] provides six, and Al-Baydawi [d. 1286 CE] five. *With the passage of time, the number of these conditions became twelve* as enumerated by Al-Shawkani. It seems that the jurists could not agree on any definite number of these conditions, because some of them are fundamental and others are secondary. Hence fluctuation continued perennially in this whole process. *It is really difficult to be at one on such speculative questions*. According to Al-Razi six conditions are agreed and the rest are disputed.[37]

Essentially then, *Qiyas* constitutes a *speculative* proof as it is based on fallible human reasoning. However, when infallible divine sources and fallible temporal sources become part of a single toolkit, unless an appropriate level of conscious humility regarding human fallibility is taken into due consideration and *explicitly* acknowledged, excesses can occur. In the following sections, examples are dealt with whereby reputable Muslim scholars and jurisprudents have become carried away in the literal and legalistic application of *Qiyas*.

Before delving into our substantive analysis of *Qiyas*, let us begin with a revealing example of a general deduction made. Alauya is an

Islamic jurisconsult in the Philippines and a member of that country's Shari'ah Bar. In explaining *'Ibarah*, one of the methods of deducing argument (*istidlal*) from the Qur'an, he writes in his book *Fundamentals of Islamic Jurisprudence*:

> *Ibara*, or the plain sentence. Example 'Mothers, after they are divorced, shall give suck unto their children for two whole years, if the father desires to complete the term, who is obliged to maintain and clothe them according to that which is reasonable' (Qur'an, 2:233). From this verse, two deductions are made. First, the mothers are entitled to support, while breastfeeding children even though they are divorced. Second, the duty of supporting the breastfeeding mother is incumbent upon the father. This shows that the relationship of the child is closer with the father than with the mother.[38]

The second aspect of the second deduction earns some critical appraisal. If the father supporting the mother is the basis for deducing that the child is closer to the father then whenever poor people (fathers or mothers) are supported by a government welfare program, then it could also be argued that the government is closer to the child than either the mother or the father.

In analyzing these problematic matters, it is not to be inferred that the Muslim scholars and jurists had a negative intent, merely that, just as they were pious, conscientious, and brilliant men, they were also fallible. In other words there is no denying the fact that they developed many of the details concerning Islamic fiqh to the best of their ability with the primacy of Islam as the guiding principle, however, at times they also offered their reasoning with such obvious zeal that they became carried away, not stopping to consider or anticipate possible future ramifications of their pronouncements.

Many acted as trailblazers during their own time, never hesitating to cast as critical an eye as possible at the corpus of Islamic law that preceded them in order to improve it in whatever way they could. This does not mean, however, that they always succeeded in doing so.

(III) SOME PROBLEMATIC ISSUES IN THE APPLICATION OF QIYAS

Since *Qiyas* was one of the most commonly employed tools of Islamic jurisprudence, finding relevant examples whereby the scholars and jurists became carried away is not difficult. However, the few that have been selected here have great relevance to the value system of Islam.

(a) *Kafa' or Kufu': Equality in Marriage*

Marriage is the core of all social institutions and in Islam this is no exception. Marriage between two people of the opposite sex, joining together as one unit, is also, arguably, the most important personal decision in any individual's life. Since the institution is generally expected to result in a lifetime harmonious or at least a working relationship, with further bonds being created through children and still others, from the outset we have a challenging proposition with the issue of compatibility between the marriage partners being of central importance. Of course there is no such thing as a perfect or guaranteed level of compatibility, but the more the incompatibility element is minimized the better. Although it is not necessarily the case, generally speaking significant gaps in age, education, wealth, and status are impediments to a harmonious marital life.

The fact that prospective partners in marriage should share as much in common with each other or originate from as comparable a background as possible is a simple matter of common sense. Still this needs to be taken into consideration not just by the parents of the prospective partners, but also, and more importantly, by the prospective partners themselves. However, transforming the entire matter into a legal requirement and treating specific violations of it, as we explore below, as an issue of legal intervention by family members and the *Qadi* (judge), is illustrative of a legalistic tendency.

Although marriage requirements and their legal ramifications are not the same in every *madhhab* the Hanafi position, as presented in various texts of Hanafi fiqh will be sufficiently illustrative of the traditional Islamic position. The following excerpts are taken from one of

the most authoritative and respected Hanafi texts, *Hedaya* by al-Marghinani (d. 1197 CE):[39]

> *Kafat*, in its literal sense, means equality. In the language of the law it signifies the equality of a man with a woman...
>
> In marriage regard is had to equality, because the Prophet has commanded, saying, 'Take ye [*sic*]care that none contract women in marriage but their proper guardians, and that they be not so contracted but with their equals'; and also, because the desirable ends of marriage, such as cohabitation, society, and friendship, cannot be completely enjoyed excepting by persons who are each others equals (according to the customary estimation of equality) as a woman of high rank and family would abhor society and cohabitation with a mean (i.e., lesser) man; it is requisite, therefore, that regard be had to equality with respect to the husband; that is to say, that the husband be the equal of his wife; but it is not necessary that the wife be the equal of the husband, since men are not degraded by cohabitation with women who are inferiors. It is proper to observe, in this place, that one reason for attending to equality in marriage is, that regard is had to that circumstance in confirming a marriage and *establishing its validity; for if a woman should match herself to a man who is her inferior, her guardians have a right to separate them, so as to remove the dishonour they might otherwise sustain by it*.[40]

The problem with this passage is the direction that something is a "requirement" of marriage when neither the Qur'an nor the Sunnah specifies any such thing. Moreover, the imputation that the guardians of the two prospective marriage partners can legally intervene through the court system to have the marriage dissolved if the marriage does not meet these requirements is unwarranted. Apparently, the requirement in question is based on a textual proof emanating from the Prophet, according to the following narration:

> A'isha reported that the Prophet (s) said: "Choose for your sperms the best women, marry with comparable [in Arabic, *akfa'*] and make proposal of marriage to them."[41]

It is important to note that there is plenty of similar guidance from the Prophet which constitutes eminently sensible and wise advice, and which should not necessarily be treated as a matter of law. Transmuting all manner of issues into legal matters is the kind of excessive legalism that Muslim society has fallen victim to.

A closer look at the narration reveals that it is not a *mutawatir* hadith, the likes of which yield certainty of knowledge concerning the sayings of the Prophet. The narration constitutes neither *mutawatir bi al-lafz* (the exact words) nor *bi al-maʿna* (the exact meaning). Had the narration been accorded the category *sahih* – otherwise known as authentic Hadith – then in this case certainty of knowledge is not yielded. However, a bigger problem is the fact that the hadith is not even *sahih*. The relevant commentary in *Sunan Ibn Majah* clarifies the predicament exactly:

> According to al-Zawaid, its isnad contains in it Harith b. Imran al-Madine. Abu Hatim said about him: "He is not a sound transmitter and the Hadith, i.e. this Hadith, that he transmitted from the reliable authorities, has no basis." Dara Qutni said, "He is *matruk*."[42]

Indeed aside from this hadith, trawling through Hadith literature reveals the absence of any other narrations concerning this subject. In al-Bukhari and *Sunan Abu Dawud*, for example, there are chapter headings entitled "Equality in marriage," but none of these hadiths is as specific as the one cited in Ibn Majah. Abu Dawud contains the following:

> Narrated Abu Hurayrah: Abu Hind cupped the Prophet (p) in the middle of his head. The Prophet (p) said: "Banu Bayadah, marry Abu Hind (to your daughter), and ask him to marry (his daughter) to you." He said: "The best thing by which you treat yourself is cupping."[43]

Only speculation can explain the invention of a law, deduced from this narration, the violation of which can be subject to legal intervention. Another pertinent hadith occurs in *Sahih al-Bukhari* under the heading "Equality of wealth" where, once again, the relevance of the

narration serving as the basis for a legal requirement of this magnitude is subject to doubt, to say the least:

> Narrated 'Ursa: that he asked 'Ayesha regarding the Verse: 'If you fear that you shall not be able to deal justly with the orphans' (4.3) She said, "O my nephew! This Verse refers to the orphan girl who is under the guardianship of her guardian who likes her beauty and wealth and wishes to (marry her and) curtails her Mahr. Such guardians have been forbidden to marry them unless they do justice by giving them their full Mahr, and they have been ordered to marry other than them. The people asked for the verdict of Allah's Apostle after that, so Allah revealed: 'They ask your instruction concerning the women whom you desire to marry.' (4.127) So Allah revealed to them that if the orphan girl had beauty and wealth, they desired to marry her and for her family status.
>
> They can only marry them if they give them their full Mahr. And if they had no desire to marry them because of their lack of wealth and beauty, they would leave them and marry other women. So, as they used to leave them, when they had no interest, in them, they were forbidden to marry them when they had such interest, unless they treated them justly and gave them their full Mahr...."[44]

So, it would seem that some valuable words of wisdom and an exhortation from the Prophet have been turned into a matter of law based on a hadith that is not only doubtful, but also does not comprise an authentic, undisputed, or clearly relevant hadith. Yet, this is not an example of *Qiyas* because the general principle of equality or compatibility underlying the legal position is at least informed by a hadith, as in *Sunan Ibn Majah* (even though, amazingly, it is not considered authentic). However, what the relevant scholars then did was to stretch the issue of equality to a level such that it fell within the realm of *Qiyas*, as this type of argumentation is supported neither by the Qur'an nor the Sunnah:

> Equality in point of freedom is the same as in point of Islam, in all the circumstances above recited, because bondage is an effect of infidelity, and the properties of meanness and turpitude are therein found.[45]

The above provision actually separates those who are free from those suffering bondage (slaves). The classical treatment of slavery is irreconcilable with the Islamic principles of justice and dignity – this, however, is an entirely separate topic which is not discussed here[46] – what is important to note, however, is that the actual hadith does not specify any parameter for *kafa*'. Yet, one can argue that freedom is an essential human condition (refer to Islamic value No. 4 in Chapter Two) and that compatibility between prospective partners in this regard is also a matter of common sense without the subject belonging in the legal domain. Similarly, the specification of *kafa'* in terms of piety and virtue in the following case is simply untenable:

> Regard is to be had to equality in piety and virtue, according to Haneefa and Abu Yusuf; and this is approved, because virtue is one of the first principles of superiority, and a woman derives a degree of scandal and shame from the profligacy of her husband, beyond what she sustains even from that of her kindred. ...[47]

It stands to reason that any individual possessing a poor reputation or bad habits should have these taken into consideration by the relevant parties prior to marriage. But the question must be posed, why turn this into a matter of law when two adult Muslims want to marry, even where there is an absence of *kafa*' in terms of their piety and virtue?

> Equality is to be regarded with respect to property, by which is understood a man being possessed of a sufficiency to discharge the dower and provide maintenance; ...[48]

Once again, the dower (*mahr)* is a required condition of marriage and is covered by separate evidence contained in the Qur'an and Sunnah. Some degree of compatibility, especially in terms of wealth and property, is a matter of common sense once again. However, there is little need to turn the issue into a legal requirement, except to protect the rights of any weaker or disadvantaged party.

Still further elaboration of *Qiyas* by the relevant scholars has resulted in its totally unacceptable exaggeration, where the idea of "equality" is

turned on its head, contradicting the pristine Islamic principles and value of justice and egalitarianism (No. 2 and 3 Values discussed in Chapter Two):

> Equality is to be regarded in trade or profession, according to Abu Yusuf and Mohammed ... the profession is not to be regarded, unless where it is of such degrading nature as to oppose an insurmountable objection; such as for instance barbers, weavers, tanners, or other workers in leather, and scavengers, who are not the equals of merchants, perfumers, druggists, or bankers.[49]

Of course common sense dictates that marrying a woman of a higher professional social standing to someone of a lower professional one is to invite trouble, possibly. Nevertheless, if the woman is an adult and desires the marriage despite the obvious disparity surely this should be her prerogative; the need for professional equality is not a strict requirement. What is particularly objectionable in the tract is the identification of barbers, weavers, tanners etc. as being involved in degrading professions. In fact, there is no evidence anywhere that the Prophet made any pronouncements denigrating any particular profession, rather he recognized and honored honest labor:

> Equality is regarded with respect to lineage, this being a source of distinction among mankind; thus it is said "a Quraish is the equal of a Quraish through all their tribes;" that is to say, there is no pre-eminence among them, between Hashmees and Nislees, Teyemees or Adwees; and in like manner they say, "An Arab is the equal of an Arab." — This sentiment originates in a precept of the prophet to this effect; hence it is evident that there is no pre-eminence considered among the Quraish tribes: and with respect to what Imam Mohammed has advanced, that "pre-eminence is not regarded among the Quraish tribes or families, excepting where the same is notorious, such as the house of the Caliphs," his intention in this exception was merely to show that regard should be had to pre-eminence in that particular house, out of respect to the Khalifas, and in order to suppress rebellion or disaffection; and not to say that an original equality does not exist throughout. ...

> Mawalees, that is to say, Ajams, who are neither Quraishis nor Arabs, are the equals of each other throughout, regard not being had among them to lineage, but to Islam. — Thus an Ajam whose family have been Muslims for two or more generations is the equal of one descended of Muslims ancestors; — but one who has himself embraced the faith, or he and his father only, is not the equal of an Ajam whose father and grandfather were Muslims; because a family is not established under any particular denominator (such as Muslims, for instance) by a retrospect short of the grandfather. – This is the doctrine of Haneefa and Mohammed. Aboo Yusuf says that an Ajam whose father is a Muslim is the equal of a woman whose father and grandfather are Muslims.
>
> An Ajam who is the first of his family professing the faith is not the equal of a woman whose father is a Muslim.[50]

The reasoning above, except in the case of Abu Yusuf's dissenting opinion, categorically contradicts the teachings of the Prophet. In his famous last sermon, the Prophet demolished all discriminatory and unjust notions when he said:

> All mankind is from Adam and Eve .There is no superiority of an Arab over a non-Arab, or of a non-Arab over an Arab, or of a white man over a black man, or of a black man over a white man, except in terms of *Taqwa* (piety) and good action.

Therefore to maintain that a non-Arab is not the equal of an Arab is quite simply erroneous: contradicting, as it clearly does, the explicit teaching of the Prophet. To further claim that a converted Muslim is not equal to someone who has been born into a Muslim family is also an outrageous misapplication of *Qiyas*. Under the same subject of *Kafa'*, *Hedaya* then deals with the issue of dower or *mahr* and turns it into an issue of legality:

> If a woman contracts herself in marriage, consenting to receive dower of much smaller value than her proper dower, the guardians have a right to oppose it, until her husband shall agree either to give her a complete proper dower, or to separate from him. This is according to Haneefa. – The two disciples maintain that the guardians are not possessed of any such authority.[51]

Although the two disciples of Imam Abu Hanifah – Abu Yusuf and Muhammad – disagreed with him (which is comforting), nevertheless, subsequent Hanafi fiqh seems to have resolved the particular issue in favor of the Imam's opinion rather than the better judgment of his disciples. They alternatively upheld the principle that most of these issues remain the prerogative of the consenting mature female, holding it incorrect for the woman's guardians to intervene in these matters. This in fact is the strongest and most correct Islamic position.

The overextension of *Qiyas* to encompass all manner of problems and situations, as presented in al-Marghinani's *Hedaya*, continued in later legal treatises. Further examples of this tendency occur in, among other sources, Haskafi's (d. 1677 CE) *Durr-ul-Mukhtar*:

> A person who has himself adopted the Mohammadan faith is unequal to one whose father (also) was a Muslim and one who has been emancipated is unequal to a free man or to an emancipated slave whose mother was a free woman originally.[52]

> A male emancipated by a man of low class will not be equal to a woman emancipated by a person belonging to the gentiles.[53]

> An Ajam (non-Arab) male is not as equal to an Arab female, although the Ajam be a learned man or a king, and this is the most correct view.[54]

> A Hanafi male is an equal to the daughter of a Shafei, and if we are asked as to whether it is valid according to the doctrines of that sect, we will say in reply that it is valid according to our sect.[55]

Incredibly, the segment dealing with this topic from *Hedaya* begins with the prefatory remark: "*Kafat*, in its literal sense, means equality. In the language of the law it signifies the equality of a man with a woman..."[56] However, the subsequent legal analysis and reasoning flipped the issue of equality into an endorsement of inequality. What was supposedly formulated to protect the rights and status of women and their families instead ensured their inferiority as revealed in the following passage: "A man is said to be *kufu* of another, when he is equal to that other. Here from *kufuship* is meant a particular kind of equality

or *inferiority of bride* (to bridegroom)."[57] How the scholars can transform an issue of equality into one involving the alleged inferior status of a bride requires an explanation – in this case it revolves around the unwarranted embellishment of *Qiyas*.

Apart from a few types of specified marriage partners there are no Qur'anic prohibitions concerning the legality of contracting women in matrimony. Instead, the emphasis is one of religious compatibility, piety and fairness:

> Also (prohibited are) women already married, except those whom your right hands possess: Thus hath Allah ordained (Prohibitions) against you: Except for these, *all others are lawful*, provided you seek (them in marriage) with gifts from your property – desiring chastity, not lust, seeing that you derive benefit from them, give them their dowers (at least) as prescribed; but if, after a dower is prescribed, agree Mutually (to vary it), there is no blame on you, and Allah is All-Knowing, All-Wise. (*Surah al-Nisa'*, 4:24)

The hadith concerning *kafa*' mentioned in *Sunan Abu Dawud* (see above) contains some comments by the translator which are instructive:

> Abu Hind was a freed slave of Banu Bayadah. He was not a member of their tribe. The Prophet (p) asked Banu Bayadah to give their daughter in marriage to Abu Hind and ask him to marry his daughter to them. This shows that only religion shall be considered in respect of equality in marriage. This is the view held by Malik. This means that it is not necessary that equality in point of lineage, vocation, status and other qualities should be considered in marriage. For the purpose of marriage only religion is worth consideration. A Muslim can marry any Muslim woman whatever her lineage, status and vocation may be. Ibn Umar, Ibn Mas'ud, Muhammad b. Sirin and Umar b. Abd Al-Aziz are reported to have held this view. According to most of the scholars, equality in point of religion, status, lineage, vocation, soundness of health and financial condition should be considered in marriage. Equality in lineage is taken into consideration by the majority of the scholars. According to Abu Hanifah, the Quraish are equals to each other. The Arabs are equal to each other. Non-Arabs are not equal to the Arabs. Al-Shafi'i holds a moderate view. He thinks that equality should be taken into consideration in marriage. But marriage is not forbidden between non-equals. If two parties marry, but

> they are not equal to each other, their marriage is valid with their mutual consent. In case marriage is contracted between the non-equals without their mutual consent and agreement, that marriage can be dissolved. It should be noted that *there is no sound tradition in support of equality of lineage in marriage.*[58]

Hamudah Abd al-Ati, author of the scholarly work *Family Structure of Islam*, offers an illuminating analysis as to why the Classical scholars may have gone in the direction of emphasizing *kafa*'.[59] He makes a distinction between "social equality in marriage" and "religious equality in marriage." Al-Ati establishes the fact that pre-Muhammad[60] Arab society was very hierarchical and stratified, based, as it was, on a variety of distinguishing parameters. The society strongly emphasized the need to maintain the class status and equality (lineage, wealth, profession, etc.) between marriage partners. By shifting the emphasis from social equality to religious equality the Prophet revolutionized the society: "Thus, a non-Muslim man is forbidden to marry a Muslim woman because he is not her equal in religion."[61] The new pioneering community, under the guidance and trailblazing leadership of the Prophet, reduced the impact of stratifying factors of social equality accordingly. Unfortunately, most likely due to the prevailing social realities and cultural norms of the expanded Muslim society across so many continents, the scholars reverted to emphasizing social equality over religious equality.

Whichever way one views this subject, the fact remains that the normal egalitarian view of Islam has been seriously compromised in the case of those rulings concerning *kafa*' through the employment of illegitimate or disputable hadiths and the wanton misapplication of *Qiyas*.

(b) *Slavery: The One-Half Rule*

Freedom and choice are conditions of first-order ranking in Islam.[62] The creation of human beings as a new species happened because God wanted to create an entity endowed with freedom and choice. Unlike the angels, who were created to serve and be obedient to Him, man was given free will. This comprises the standard Islamic position.

Thus, enslavement stands in stark contradiction to the primary conditions of Islam, value Nos. 1 and No. 3 discussed in Chapter Two.

Slavery was an institution inherited from the past and it existed as an ongoing condition during the earliest periods of Islam under the Prophet Muhammad. When Islam invited humanity back to the original and pristine teachings of God it duly upheld the fundamental dignity of mankind. It is arguable whether slavery itself was not categorically forbidden by Islam, as in the case of the prohibition of intoxicants, adultery or pork. However, although this is the traditional view it is an erroneous position according to the view of the author. Nevertheless, there is no question that Islam revolutionized the condition of slavery and set the institution on the path of abolition. It even established a permanent fund as part of the public alms-giving ritual, zakah, specifically designated for securing the manumission of those who were enslaved.[63]

Slaves in the ancient world, including Arabia, did not possess *any* rights and could be treated in whatever way their owners preferred. For instance they could be abused or even killed and instead of inviting censure these actions were recognized as a privilege of the owning class. Once a slave, always a slave, went the maxim, even down through the generations.

The guidance of the Qur'an, together with the leadership of the Prophet, revolutionized contemporary Arabian society by defining and establishing the laws and parameters for slave ownership. As a result their human dignity was elevated and a movement aimed towards freeing all existing slaves put into motion. The enslavement of free people became prohibited, except as prisoners of war. Even in the case of prisoners of war and existing slaves, general incentives, as well as simple exhortation, facilitated an environment for gaining their freedom. One portion of the obligatory zakah was permanently allocated for manumission from slavery:

> Zakat is for the poor and the needy, and those employed to administer the (funds); for those whose hearts have been (recently) reconciled (to Truth); *for those in bondage* and in debt; in the cause of Allah and for the wayfarer: (thus is it) ordained by Allah, and Allah is full of knowledge and wisdom. (*Surah al-Tawbah*, 9:60)

The Prophet taught that freeing people was such a noble virtue that it would help people in their salvation in the Hereafter. Some war captives (who could have been turned into slaves) were given the option of emancipation if they could teach a number of people from the nascent Muslim community in Madinah to read. The Prophet presented the act of freeing people from bondage as an important way to expiate for their sins. And freeing slaves was established as a remedy in case of their physical mistreatment:

> Narrated Abu Musa Al-Ashᶜari: "The Prophet said, 'Give food to the hungry, pay a visit to the sick and *free those in bondage*.'"[64]

> Narrated Asma: "No doubt the Prophet ordered people to manumit slaves during the solar eclipse."[65]

> 'Abdullah b. 'Umar reported that 'Umar b. Khattab asked the Messenger of Allah (s) as he was at ji'rana (a town near Mecca) on his way back from Ta'if: Messenger of Allah, I had taken a vow during the days of Ignorance that I would observe I'tikaf for one day in the Sacred Mosque. So what is your opinion? He said: "Go and observe I'tikaf for a day." And Allah's Messenger (s) gave him a slave girl out of the one-fifth (of the spoils of war meant for the Holy Prophet). And when Allah's Messenger (s) set the war prisoners free. 'Umar b. Khattab heard their voice as they were saying: Allah's Messenger (s) has set us free. He (Hadrat 'Umar) said: "What is this?" They said: "Allah's Messenger (s) has set free the prisoners of war (which had fallen to the lot of people)." Thereupon he (Hadrat 'Umar) said: "Abdullah, go to that slave-girl and set her free."[66]

> Zadhan reported that Ibn Umar called his slave and he found the marks (of beating) upon his back. He said to him: "I have caused you pain." He said: "No." But he (Ibn Umar) said: "You are free." He then took hold of something from the earth and said: "There is no reward for me even to the weight equal to it. I heard Allah's Messenger (s) as saying: *He who beats a slave without cognizable offence of his or slaps him, then expiation for it is that he should set him free*."[67]

> Abu Mas'ud reported that he had been beating his slave and he had been saying: "I seek refuge with Allah," but he continued beating him,

whereupon he said: "I seek refuge with Allah's Messenger," and he spared him. Thereupon Allah's Messenger (s) said: "By Allah, God has more dominance over you than you have over him (the slave)." He said that he set him free. This Hadith has been narrated on the authority of Shu'ba with the same chain of transmitters, but made no mention of (these words) of his: "I seek refuge with Allah, I seek refuge with Allah's Messenger (s)."[68]

Abu Huraira reported Allah's Messenger (s) as saying: "When the slave of anyone amongst you prepares food for him and he serves him after having sat close to (and undergoing the hardship of) heat and smoke, he should make him (the slave) sit along with him and make him eat (along with him), and if the food seems to run short, then he should spare some portion for him (from his own share)" – (another narrator) Dawud said: "i.e. a morsel or two."[69]

Narrated Al-Maʿrur: "At Ar-Rabadha I met Abu Dhar who was wearing a cloak, and his slave, too, was wearing a similar one. I asked about the reason for it. He replied, 'I abused a person by calling his mother with bad names. The Prophet said to me, "O Abu Dhar! Did you abuse him by calling his mother with bad names? You still have some characteristics of ignorance. *Your slaves are your brothers* and Allah has put them under your command. So whoever has a brother under his command should feed him of what he eats and dress him of what he wears. Do not ask them (slaves) to do things beyond their capacity (power) and if you do so, then help them."'"[70]

Narrated Anas: "The Prophet said, 'None of you will have faith till he wishes for his (Muslim) *brother* what he likes for himself.'"[71]

It is notable that the Prophet elevated slaves to the status of brothers (as part of the same fraternity) and admonished the community (as per the preceding hadith) so that none were mistreated by them. The result of all these initiatives was that a movement started according to which the earliest generations started freeing their slaves thus honoring the laws and parameters established by Islam. Within the lifetime of the Prophet, former slaves were fully accepted in the fraternity with some immediately accepted for positions of honor i.e. as the caller to prayer

(*mu'adhdhin*) at the Prophet's Mosque. This trend continued, with the sons of former slaves commanding military expeditions in which the Companions of the Prophet, many constituting the former nobility and aristocracy, were included as ordinary soldiers.[72]

It is important to understand that thus far this discourse about slavery refers to only those who were already slaves. This is so because transforming free people into slaves (through trade) is regarded as prohibited. Several narrations in *Sahih al-Bukhari* and other collections, similar to the one below, indicate that God will be an adversary in the afterlife against those who enslave freemen (and women).

Narrated by Abu Hurayrah:

> The Prophet said, "Allah says, 'I will be against three persons on the Day of Resurrection: One who makes a covenant in My Name, but he proves treacherous. *One who sells a free person (as a slave)* and eats the price. And one who employs a laborer and gets the full work done by him but does not pay him his wages.'"[73]

Based on *ahadith* like the one above the scholars and jurisprudents hold the opinion that trade involving freemen is prohibited. Therefore, the issue of slavery in Islamic law is really only applicable to those who are already in this state or where war captives are concerned.

Although the pertinent verses in the Qur'an have yet to be dealt with the ethos of Islam is summed up in one terse Prophetic command: "Set free the slaves (*raqaba*)..."[74]

The classical orthodox position erroneously argues that the Prophet never specifically or categorically prohibited the practice. However, this is based on the assertion that the word '*haram*' (that which is forbidden) or any other prohibitive injunction, concerning the case of slavery, does not appear anywhere in the Qur'an or the Prophetic narrations. This is a terrible error because those aspects that are considered 'prohibited' (*haram*) or 'obligatory' (*fard*) are not necessarily based on the explicit presence of these terms in the textual sources (i.e., the Qur'an and Sunnah) themselves. Indeed, the scholars and jurisprudents have ruled as prohibited or obligatory so many issues based on their opinions derived from the weakest narrations and most

tenuous application of *Qiyas* (as illustrated in the preceding section on *Kafa'*). When it came to ensuring that the Prophetically sanctioned emancipation movement reached its logical conclusion the original Islamic ethos was, alternatively and all too unfortunately, turned on its head.

Instead of upholding the fundamental dignity and sanctity of human beings as the norm, as well as carrying on the emancipation movement, subsequent generations reconciled themselves to the existence of slavery as an ongoing institution. By the time the orthodox schools of Islam came to be formalized the institution of slavery was treated as normal and *Qiyas* employed to further normalize the related institution. Indeed, one can observe certain leading jurisprudents dealing with the issue of slavery by valuing the condition as a form of commodity. For example, Imam Shafi'i opines about the determination of the blood-money value of the slave as follows:

> Ibn Shihab said: Others have added: "[The price of the slave] shall be estimated in the same manner as that of a commodity. ... He asked: 'What is the proof?' [Shafi] replied: 'It is an analogy [based on the case] of the criminal offence committed by a freeman.' He said: '[The compensation for the slave] differs from the *diya* of the freeman, because the latter is specified, while the former is equal to his price, just as commodities – such as camels, beans, beasts and the like – are priced.'"[75]

The casual dehumanization of slaves through their equation to commodities via the expediency of scholastic analogy is most regrettable because it is so inconsistent with the Qur'anic and Prophetic perspective ennobling and sanctifying human life [Value No. 1 discussed in Chapter Two]. A still more egregious application of *Qiyas* to the law of slavery has been formulated using a mathematical function based on the assumption of a half value known as the One-Half Rule.

Variations on the One-half Rule can be found in almost all traditional schools of fiqh. According to Imam Malik:

> Yahya related to me from Malik from Ibn Shihab that he was asked about the hadd of the slave for wine. He said, "I heard that he has half the hadd of a freeman for drinking wine. Umar ibn al-Khattab, Uthman ibn Affan,

and Abdullah ibn Umar flogged their slaves with half of the hadd of a freeman when they drank wine."[76]

A closer and more detailed look at the Hanafi position, once again, from *Hedaya*, reveals that slaves are allowed to marry up to two wives, which is half the amount permitted for free Muslim men:

> It is lawful for a freeman to marry four wives, whether free or slaves; ... *It is unlawful for a man who is a slave to marry more than two women*; Malik maintains that it is lawful for a slave to marry as many women as a freeman, he holding it as a principle, that a slave, with respect to marriage, is in every particular the same as a free person, insomuch that (according to him) a slave is authorized to marry without his proprietor's consent. – The argument of our doctors, in this case, is that *slavery operates to the privation of one half of the natural privileges and enjoyments*, and the legality of four wives in marriage being of this description, it follows that the privilege of a slave extends to the possession of two wives only, in order that the dignity of freedom may be duly supported.[77]

However, this position is contradicted by the Shafiʿi position concerning the number of pronouncements required of a male slave when divorcing his partner (a female slave):

> The utmost number of divorces, with respect to a female slave, is two, whether her husband be a slave or free; and the same with respect to a free woman is three. – Shafei has said that, in the number of divorces, respect [is] to be had to the state of the man; that is to say, if the husband be free he is empowered to pronounce three divorces although his wife be a slave; whereas, if he be a slave, he is not authorized to give more than two divorces, although his wife should be a free woman, the prophet having said, 'In divorce the state of the husband is to be regarded, and in iddat that of the wife:' – 'The divorces of a female slave are two and her iddat is two courses.' Secondly, it is the woman who is the subject of legality, and this legality entitles her to benefits; but *slavery entitles only to half of these benefits*; hence it follows that, the divorce of a female slave should not exceed one and a half, but such subdivision of it being impossible, her divorces extend to two. — As to the saying of the prophet quoted by Shafei, that "in divorce the state of the husband is to be regarded," it means no more than that the efficiency of divorce proceeds from him.[78]

Free men are required to pronounce the words "I divorce you" three times, however, if the One-Half Rule is applied rigorously in the case of male slaves then they would be obliged to apply the same formula precisely one and a half times. Clearly this is nonsense, begging the question where does the One-Half Rule originate? The following verse locates the apparent cause:

> If any of you have not the means wherewith to wed free believing women, they may wed believing girls from among those whom your right hands possess: And Allah hath full knowledge about your faith. You are one from another: Wed them with the leave of their owners, and give them their dowers, according to what is reasonable: They should be chaste, not lustful, nor taking paramours: when they are taken in wedlock, *if they fall into shame, their punishment is half that for free women*. This (permission) is for those among you who fear sin; but it is better for you that you practise self-restraint. And Allah is Oft-Forgiving, Most Merciful. (*Surah al-Nisa'*, 4:25)

This verse indicates that in the case of adultery the female slave is to receive a punishment that is equivalent to one-half of the punishment due to a free married woman. Where is the indication here or elsewhere in the Qur'an, or in any of the Prophetic narrations – *mutawatir* or otherwise –that this specifies a general rule to be applied as a norm for all laws pertaining to slaves? Instead of moving towards the gradual abolition of slavery, in keeping with the legacy and vision of the Prophet, more detailed laws were formulated to deal with the issues and problems related to slavery. The abandonment of the Prophetic legacy resulted in books of Islamic law, such as *Hedaya*, written almost six centuries afterwards, where in the discussion about laws on slavery there is no mention of emancipation as a great virtue, or the Prophet's initiation of the movement toward its abolition, or slavery representing a denial of the fundamental dignity and sanctity of humanity, or any slavery-related provisions in the fiqh left in as merely a transitional aspect until slavery was eliminated from the world.[79]

Applying the reduced punishment of female slaves in the case of adultery and to the domain of marriage, divorce, as well as other issues concerning the transactions of slaves, is illustrative of the

misapplication of *Qiyas*. Imam Malik both challenged and rejected the misuse of *Qiyas* in this and similar cases:

> Malik maintains that it is lawful for a slave to marry as many women as a freeman, he holding it as a principle, that a slave, with respect to marriage, is in every particular the same as a free person, insomuch that (according to him) a slave is authorized to marry without his proprietor's consent.[80]

Imam Malik's legal viewpoint is commendable, maintaining that except for what has been specified in the Qur'an, there is no basis for analogical extrapolation regarding slaves and the condition of slavery. However, all the traditional schools, including the Maliki *madhhab*, have dealt with slavery in their jurisprudence as something normal and ongoing.

It is worth mentioning that, as in the case of *Kafa'* (equality), the traditional schools have gone to the furthest extent to identify even the weakest Hadith, and where no textual source could be found, employed *Qiyas* to draw exaggerated conclusions and laws. In Chapter Three, we presented other examples where unwarranted conclusions have been drawn based on Hadith and in some cases, the misapplication has seriously undermined the role and position of women in Muslim society.

In contradistinction to the many and varied juristic opinions regarding slavery, Prophetic *ahadith* have instead established the principle of emancipation. By way of example, there is one narration, which originates from *Musnad Ahmad,* where the Prophet clearly commanded: "Set free the slaves (*raqaba*)..."[81]

The Qur'an also exhorts believers to embrace the virtue of human dignity and liberation. In the following verses, the Qur'an offers the prospect of freeing slaves as expiation for certain transgressions, big and small:

> Never should a believer kill a believer; but (if it so happens) by mistake, (Compensation is due): If one (so) kills a believer, it is ordained that he should free a believing slave, and pay compensation to the deceased's family, unless they remit it freely. If the deceased belonged to a people at war with you, and he was a believer, the freeing of a believing slave (is

> enough). If he belonged to a people with whom you have treaty of Mutual alliance, compensation should be paid to his family, and a believing slave be freed. For those who find this beyond their means, (is prescribed) a fast for two months running: by way of repentance to God: for God hath all knowledge and all wisdom. (*Surah al-Nisa'*, 4:92)

> God will not call you to account for what is futile in your oaths, but He will call you to account for your deliberate oaths: for expiation, feed ten indigent persons, on a scale of the average for the food of your families; or clothe them; or *give a slave his freedom*. If that is beyond your means, fast for three days. That is the expiation for the oaths you have sworn. But keep to your oaths. Thus doth God make clear to you His signs, that you may be grateful. (*Surah al-Ma'idah*, 5:89)

> But those who divorce their wives by Zihar, then wish to go back on the words they uttered, (It is ordained that such a one) *should free a slave* before they touch each other: Thus are you admonished to perform: and God is well-acquainted with (all) that you do." (*Surah al-Mujadalah*, 58:3)

These verses should be considered a sufficient and considerable encouragement towards emancipating slaves. One of the Qur'anic verses that stands in distinction to the others, and which in actual fact represents a far higher call, is the following where the exhortation to liberate slaves is listed before two of the obligatory (*fard*) duties of Islam: prayer (salah) and almsgiving (zakah):

> It is not righteousness that you turn your faces towards East or West; but it is righteousness to believe in God and the Last Day, and the Angels, and the Book, and the Messengers; to spend of your substance, out of love for Him, for your kin, for orphans, for the needy, for the wayfarer, for those who ask, and *for the ransom of slaves*; to be steadfast in prayer, and practice regular charity; to fulfill the contracts which you have made; and to be firm and patient, in pain (or suffering) and adversity, and throughout all periods of panic. Such are the people of truth, the God-fearing. (*Surah al-Baqarah*, 2:177)

The chapter *Surah al-Balad* in the Qur'an is particularly relevant to the issue of freedom and slavery. This beautiful surah begins with the

emphatic affirmation of the fundamental freedom of human beings and directly addresses the Prophet, reminding him that he himself is a free person:

> I do call to witness this City; And thou are a *free person* (*hillun*) of this City; And (the mystic ties of) parent and child; Verily We have created man into toil and struggle. (*Surah al-Balad*, 90:1–4)

The climax to the Surah comes in the following verses where it is mentioned that God has shown humanity two paths representing truth and falsehood, right and wrong, virtue and vice, good and evil. However, one of the paths is more difficult and thus people have a tendency to indulge in the easier path instead, rather than suffering the tribulations required to achieve higher standards:

> And (have We not) shown him the two highways? But he has made no haste on the path that is steep (*Aqaba*). And what will explain to you the path that is steep (*Aqaba*)? (It is:) *freeing the bondsman/slave* (*raqaba*). (*Surah al-Balad*, 90:10–13)

After mentioning 'freeing the slave,' *Surah al-Balad* continues by referring to other things that represent the steep path, which people so easily shy away from:

> Or the giving of food in a day of privation. To the orphan with claims of relationship, Or to the indigent (down) in the dust. Then will he be of those who believe, and enjoin patience, (constancy, and self-restraint), and enjoin deeds of kindness and compassion. Such are the Companions of the Right Hand. But those who reject Our Signs, they are the (unhappy) Companions of the Left Hand. On them will be Fire vaulted over (all round). (*Surah al-Balad*, 90:14–20)

Here the message of the Qur'an is categorical. God has divulged two routes. One is steep and involves freeing the enslaved, feeding the hungry, as well as caring for orphans, the needy, destitute and deprived (representing the weak, disadvantaged and most often the powerless). The chapter ends with the declaration: "Then will he be of those who

believe ... Such are the Companions of the Right Hand" indicating those who would receive salvation on the Day of Judgment. In this passage is contained a stern warning against those who will not travel the steep path, choosing instead the easy route that does not require struggle or sacrifice.

It is a wonder that so many among the erudite scholars and jurisprudents went to the utmost extent to discern even the weakest Hadith (often resorting to non-textual evidence) in order to draw their outrageous conclusions. They seem to have engaged in endless arguments, formulating all manner of excuses where slavery is concerned. This is yet another pitiful example of legalism, where the goal or intent (*maqasid*) of Islam is overlooked, neglected, compromised or even sacrificed.

It is this legalistic approach and mindset that has misled the scholars and jurisprudents. Based on narrations like the one in *Sahih al-Bukhari*, where God explicitly states He will be against anyone "who sells a free person (as a slave) and eats the price," the scholars have arrived at a consensus whereby enslaving the free is forbidden. Thus, the norm should have been to affirm the fundamental dignity of human beings. However, the scholars and jurisprudents became the prisoners of their own legalism instead of uprooting the practice and treating its remains as a purely transitory phenomenon.

The crux of the issue is not whether there is an explicit text or evidence that Islam prohibits slavery (even though it is possible to legitimately argue that all the scholarly prohibitions and restrictions are not based on explicit text or evidence). No, the real issue is whether Islam upholds the fundamental dignity and sanctity of human beings and thus affirms freedom as a condition of the first order. This the Qur'an clearly does, the implementation of which was firmly established through the manifest practice of the Prophet, as well as in the exhortation and demands of the earliest Muslim communities towards abolition; this pristine disposition subsequently became lost in a maze of traditional legalism.

(c) *Marriage, Contract and Sale*

Marriage is the core of all social institutions. In some societies and religions, such as Christianity, marriage is a sacrament (i.e. "a rite which removes the taboo on sexual intercourse between a man and a woman, while at the same time imposing a lifelong taboo on the intercourse of either of them with a third party")[82] by which it is made so sacred that traditionally it could not be dissolved. This is why the Roman Catholic Church considers divorce as one of the greatest sins and as such, effectively, prohibited. On the other hand, in many modern, secular societies, marriage represents no more than a contract, and thus no permanence or sanctity is attached to it. Indeed, the direction of these societies is such that even marriage is not legally required for the union of two people. Living together without marriage, having children out of wedlock, even marriage within the same sex, are all being accommodated or legalized in the present secular times. Marriage in Islam is neither sacramental nor is it merely a contract:

> The distinction between sacred and secular was never explicit in Islam. Any action or transaction has religious implications. Legitimate sex is not defined as evil. Women, at least in doctrine, are not held inferior to men on the spiritual level, since they are not thought of as 'guilty' of any offenses from which men were, or are, free and immune. Moreover, marriage in Islam was not conditional on officiation by a priest because, strictly speaking, there was no such office. Neither was religious benediction, though highly recommended for the occasion, a necessary requisite for the validity of the marriage. ... [Thus] 'marriage is a contract, but it is also a covenant.'[83]

However, it appears that legalistic tendencies, which have become dominant in the general practice of Islamic law, have caused marriage to be viewed with an overwhelming bias toward the contractual dimensions involved. From the dowry to maintenance, from marital obligations to the conditions of divorce and its procedures, the emphasis is focused on contractual aspects rendering marriage a totally formalistic experience.

The idea of a dowry (from the bridegroom to the bride) is not unique to Islam. Indeed in various societies and cultures, and throughout history, it has been present:

> The conception of dowry is usually associated with a particular type of marriage, namely, marriage by purchase. This type of marriage 'has been widely spread throughout the world and throughout history ... [I]t has prevailed in all branches of the Semitic race ... [But] we should notice that marriage by purchase did not imply the purchase of a piece of property...'[84]

> The fact that marriage has been for so long accompanied by a 'bride price' or 'groom price' is interesting. The origin of the bride price, according to a contemporary anthropologist, 'must be sought in a family setup in which a young girl was an economic asset for her father's family. The departure of that girl from her own family was an economic loss, and this was compensated by the bride price. From the point of view of the bridegroom's family, the acquisition of a wife meant the addition of a pair of working hands in exchange for the amount paid over the bride's family.' This may explain the origin of the custom, but it can hardly explain its continuation where there are no such extended families, or where the woman herself is the recipient of dowry.[85]

Al-Ati provides a detailed exposition of various economic and other modern theories to explain the custom surrounding the dowry. However, his analysis shows that none of these concepts help explain and render an understanding of the Islamic position concerning the subject. Some of the salient aspects of the dowry (*mahr*) in Islam are characterized here:

> Dowry is used here to designate what a Muslim groom gives to his prospective bride. It is her personal property which she is empowered to waive, reduce, return to her husband, or dispense with as she pleases. It is enjoined by the Qur'an, the Traditions of the Prophet, and the consensus of Muslims. It may consist of money, property, movable objects, or services rendered to the bride herself. There is a Tradition that a Companion of the Prophet wanted to marry a certain woman but had nothing to offer her in dowry. The Prophet asked him to teach her whatever he knew of the Qur'an, and that sufficed as a dowry. A certain Abu Talhah proposed

> to a woman who, in reply to his proposal, said: 'A man of your stature is not to be rejected; but you are a non-Believer and I am a Muslim. It is unlawful for me to marry you. If you embrace Islam, that will be my dowry and no more will I ask of you.' He then embraced Islam and that was her dowry. Similarly, if a master wishes to marry his slave girl and offers her freedom as a dowry, both the offer and the marriage are valid.[86]

While Islam has mandated the provision of a *mahr* it has not set any minimum or maximum and neither has it specified its exact form. This is an important notion to grasp when attempting to understand the inability of most theories to explain the Islamic position concerning the *mahr*:

> Since Islam has set neither a dowry minimum, according to the majority of jurists, nor a dowry maximum, in the opinion of all jurists, why did it prescribe it in the first place? We have previously noted several theories concerning the institutionalization of dowry. But none of these by itself seems to adequately account for the dowry in Islam.[87]

The theory that the dowry is compensation to the father or his substitute for the loss of the girl's economic service is inapplicable for the primary reason that the dowry can be such a nominal value that it would hardly be considered proper compensation to the guardian concerned. In addition, Islam mandates that the *mahr* belongs exclusively to the bride. The dowry cannot be claimed or usurped by anyone else, including the bride's parents or any other guardians:

> It is sometimes suggested that Islam has enjoined dowry in order to safeguard the economic rights of the wife after marriage and to strengthen her financial position. This view can have great explanatory value only where the dowry is large and when such economic gains are manifest functions of marriage. But this does not represent the majority of cases.[88]

There are also theories that the dowry (from bridegroom to bride) serves "as an obstacle to the dissolution of the union for frivolous reasons" or that "it worked as a deterrent to polygamy."[89] However, these theories do not hold for most marriages in Muslim societies,

where a dowry is not really significant enough to serve the said purpose. What then of the religious explanations by Muslim scholars and jurists?

> Muslim jurists of later centuries have held the technical view that dowry is enjoined in return for the man's right, at least potentially, to have legitimate access to cohabitation with the woman in question. She is entitled to dowry because she has consented to marriage and made herself accessible. Much discussion among the jurists has centered on this issue. But the exponents of this view appear to assume or to infer that women have no sexual desires and needs of their own, that gratification is not reciprocal, that sex is a cheap commodity in view of the permissibility of nominal dowries, and that marriage is little more than a *commercial transaction*. That list of assumptions and inferences may be extended. Yet, these seem contrary to the bio-psychological facts and to the very idea of marriage which is depicted in the Qur'an (e.g., 30:21) as a shelter of peace and comfort, and as a means of mutual love and mercy.[90]

There is no established data concerning the number of Muslims who contract their marriage where the marrying parties think they are involved in a commercial transaction: the bridegroom thinking that he is involved in a *purchase* and the bride believing that she is involved in a *sale*. Even without the information gathered from scientific surveys or more extensive study of the subject it can be safely assumed that most women would be nauseated and repulsed at the thought of marriage constituting their sale and purchase. Moreover, men too would consider the idea of any kind of commercial transaction regarding marriage quite repugnant. Unfortunately, on reading the legalistic works and positions of the Muslim jurists one cannot but be left with the distinct impression that they have indeed reduced marriage to a commercial transaction:

> A woman may refuse to admit her husband to a carnal connection until she receive her dower of him, so as that her right may be maintained to the return, in the same manner as that of her husband to the object for which the return is given, *as in sale*.[91]

What is here advanced proceeds upon a supposition of the whole dower, or a certain portion of it, being Moajil, or prompt; but if the whole be Mowjil, or deferred, the woman is not at liberty to refuse the embraces of her husband, as she has dropped her right by agreeing to make her dower Mowjil, – *the same as in the case of sale*, where, if the price of the article sold be made deferrable, the seller is not at liberty to detain the article sold on account of the price.[92]

It is proper to observe, that where the woman refuses to admit the husband to a repetition of the carnal act, as above stated, yet she has, nevertheless, (according to Haneefa) a claim to her subsistence, as her refusal does not, in any case, proceed from any stubbornness or disobedience, since it is not exerted in resistance to a right, but rather in maintenance of one. – The two disciples hold that she is not entitled to any subsistence; – and their argument on this occasion is, that the sole object of the contract has been duly delivered to the husband, either by the single carnal act, or by the single complete retirement, as aforesaid; on which account it is that her right to her whole dower is confirmed and established, and consequently no right of further detention of her person remains with her; *as in a case of sale*, where the seller having delivered the article sold to the purchaser, before receiving the price, has no farther right over it.[93]

If a man marry two women by one contract, one of whom is lawful to him, and the other prohibited, his marriage with the one who is lawful holds good, but that with the other is void, because in that only a cause of nullity is found: contrary to where a man puts together a freeman and a slave, and *sells them by one agreement, as such [the] sale is null with respect to both, because [the] sale is rendered null by invalid condition,* and the consent to the contract of sale is required with respect to the free person, in order to the legality of it with respect to the slave.[94]

So, how precisely did the jurists draw this connection between marriage and 'sale'? The answer lies with *Qiyas*. Marriage is a form of contract, as is sale and purchase (commercial transactions or exchanges). Therefore, in enforcing the right of the husband to have his wife in his bed, in denying maintenance to her when she refuses to share it with him, or in determining the conditions pursuant to a lawful/valid

and unlawful/invalid marriage, the jurists have identified a tremendous analogical parallel between marriage and commercial transactions:

> It is interesting to note that the term *mahr* (bride price), which usually connotes commercialization of marriage, is not used in the Qur'an at all. It occurs very infrequently in the Traditions of the Prophet; when it does, it is usually accompanied by other terms such *faridah* (God-given right), or *sadaq* (which is connected with a root word meaning marriage-gift, charity, friendship, fidelity, truth, etc.). The jurists have used these terms interchangeably as denoting the God-given right of dowry. But it is not certain whether in these interchangeable usages the traditional connotations of the term *mahr* were sublimated to the moral and charitable denotations of terms like *sadaq*, *faridah*, and so on; or whether these terms themselves took on the traditional connotations of *mahr*. A review of the classical legal texts would seem to indicate that where it occurs, the term *mahr* is used in a sublime moral sense indistinguishable from the meaning of *sadaq*, *faridah*, and similar terms. But the law books and usages of subsequent centuries seem to use *mahr* and other alternate terms in a sense very much akin to the traditional meaning of bride-price. This reversal of meaning was apparently correlated with a decline in juristic creativity and the status of women and also with a misconception of the idea of marriage.[95]

Neither the theories offered up by social scientists nor the ones underlying the views of the Muslim jurists help in providing a proper understanding and appreciation of the role of the *mahr* in Islam. Acknowledging the need for further exploration, al-Ati offers some suggestions that are quite relevant and meaningful:

> Dowry is probably a symbolic expression of the groom's cognizance of the economic responsibilities of marriage and of his readiness to discharge all such responsibilities subsequent to marriage. It may be thought of as a manifest assurance on his part that the bride's economic security and rights will be maintained. It is a symbolic acknowledgment that he does or will dissociate the purpose of marriage from the designs of economic exploitations. For 'instinctive' or cultural reasons, it is usually the women who need reassurance of the man's intentions and interest. This reassurance may require more than verbal expressions of love and seriousness on the

> man's part, and dowry may be the tangible symbol of such love and seriousness. To the bride, it is a token of the groom's desire to enter into a union with her. To her family, it is a gesture of mutual friendship and solidarity, an assurance that their daughter will be secure and in good hands. However, there may be other symbolic meanings of dowry, as has been mentioned earlier. Nor is it to be overlooked that what is being suggested here is conceptualized in terms of the religious and moral ideals which may or may not be in fact fully implemented. There is no sufficient ground to assume that the actual has always coincided with the ideal in this case.[96]

(d) *Marriage, Contract and Lease*

The focus of the preceding section was to demonstrate how, under the influence of legalism and literalism, the scholars sometimes became carried away in their application of *Qiyas*. Inferring an analogical connection between contracts and sales and then applying it to marriage is hardly appropriate. However, there are other related issues that are also worth mentioning.

Certain aspects of Islamic law are simply impractical while others are unfair. For example, the traditional schools require that as part of the marriage the wife be entitled to her own, exclusive dwelling:

> It is incumbent upon a husband to provide a separate apartment for his wife's habitation, to be solely and exclusively appropriated to her use, so as that none of the husband's family, or others, may enter without her permission and desire, because this is essentially necessary to her, and is therefore her due the same as maintenance, the word of God appoints her a dwelling house as well as a subsistence: and as it is incumbent upon a husband to provide a habitation for his wife, so he is not at liberty to admit any person to a share in it, as this would be injurious to her, by endangering her property, and obstructing her enjoyment of his society ...[97]

> A wife is entitled to lodging in a house unoccupied by members of the husband's family.[98]

Thank God the scholars did not explicitly require every Muslim to be rich or at the very least, well-to-do, because the economic

condition of the Muslim world is such that the vast majority survives merely with just one roof over the entire family instead of inhabiting separate rooms, let alone an exclusive room just for the wife. Interestingly, women hardly know about this grand right of theirs and, understandably, there is little effort on the part of the Muslim scholars to educate them about this privilege and of the requirement of men to honor it. It is notable that there is no authentic or explicit textual evidence to offer the specified right to an exclusive dwelling for the wife, even though it can be safely asserted that Muslim wives would be deeply gratified by having this right honored.

However, lest Muslim women get carried away and insist on this valuable right after learning of it they may be in for a surprise, for it must be borne in mind that legalism and literalism have pervaded many of the laws derived in the name of Islam, meaning that in this instance things may not be all that they would seem. and there are bound to be plenty of other surprises in store for them as well, as explained below. In actual practice, the husband has far-reaching control over the situation and assigning an exclusive dwelling to a wife does not mean that she owns it:

> A husband is at liberty to prevent his wife's parents, or other relations, or her children by former marriage, from coming in to her, as her apartment or habitation is *his* property, which he may lawfully prevent any person from entering; but he cannot prevent them from seeing and conversing with her whenever they please ... Some have said that he cannot prohibit them from coming in to her, any more from conversing with or seeing her.[99]

Although the assignment of an exclusive dwelling for the wife may come as a pleasant surprise to most women (and no doubt as a shock to most men), there are also some unpleasant surprises which also await women. According to Islamic law, wives are entitled to certain maintenance (*nafaqah*). But what precisely does this consist of?

> When a woman surrenders herself into the custody of her husband, it is incumbent upon him thenceforth to supply her with *food, clothing, and*

> *lodging*, whether she be a Muslim or an [unbeliever], because such is the precept both in the Koran and in the traditions ... [100]

> *Nafaqa* literally means that which a man spends over his children; in law it means feeding, clothing and lodging; in common use it signifies food.[101]

What if the wife becomes sick, especially on a long-term or even permanent basis? In this eventuality, the *law* is very clear; the wife is legally entitled only to food, clothing and lodging. Conspicuously, there is no specific or detailed textual evidence to support so narrow a definition of maintenance. Most Muslim men and women might be shocked to learn that Islamic law does not *stipulate* that the husband should take care of his sick wife and that she is not entitled to maintenance (food, clothing, lodging), especially when she cannot fulfill the primary basis of the marriage contract: to be able to carnally satisfy the husband:

> If a woman falls sick in her husband's house, she is still entitled to a maintenance. This is upon a principle of benevolence, as *analogy* would suggest that *she is not entitled* to maintenance, where she falls sick so far as to be incapable of admitting her husband to the conjugal embrace, since in this case she cannot be deemed in custody for the purpose of enjoyment.[102]

Even though there are contrary opinions this is not simply another example of the misapplication of *Qiyas*, but the complete marginalization of the fundamental values of Islam. Once again this demonstrates the legalistic and literalist propensity to which the law has fallen victim. In a section "Maintenance in Sickness," al-Ati further elaborates:

> The Qur'an and the Sunnah have enjoined care for and kindness to the wife. Yet the application of this general principle to the case of a sick wife has stimulated curious arguments, differences or opinion, and legal niceties. According to some jurists, a sick wife who, on account of her failing health, is unable to discharge her marital duties has no legal right to maintenance by the husband.[103]

> The problem of maintenance of a sick wife is provocative, although it seems more apparent than real, that is, more of an academic exercise than a

> practical issue. It probably indicates that the later in time, the farther some jurists drifted away from the spirit of the law and its ethical foundations. It is curious that neither the Qur'an nor the Sunnah raised the problem in any way that can be likened to the approach of those jurists. Moreover, none of the disputants produces any authoritative evidence in support of his argument against the adversaries.[104]

Al-Ati writes that this tendency is not confined to maintenance only, according to the majority of jurists, sick wives are not entitled to the cost of their medical care as well. So, on what basis do the jurists, generally speaking, deny the medical costs and maintenance due to a husband's sick wife? The answer lies, once again, with *Qiyas*:

> Related to the problem of a sick wife's maintenance is the cost of her medical care. The formal consensus, not the unanimous opinion, of the majority of the jurists is that the husband is not legally responsible for the cost of medicine, the physician's fee, etc. Some jurists, however, maintain that if the husband is financially comfortable and the cost of medical care is modest, he is responsible for it. Others argue that even if he is not *legally* responsible for the cost, it is still his *religious* duty to bear the responsibility out of compassion, courtesy, or in conformity with the social norms. Those who exempt the husband from the responsibility do not consider the cost of medical care to be part of the obligatory maintenance. *They draw an* ***analogy*** *between wifedom and* ***leased property***; tenants are not responsible for the repairs and improvement of the premises. Their obligation is to pay only the rent; the rest is the owner's charge. Like a tenant, a husband is not responsible for the cost of any treatment his wife may undergo to restore or improve her health.[105]

The culprit here is clearly the overzealous application of *Qiyas*. The Qur'anic commandment to abstain from all activities when the call for the Friday prayer has been made demonstrates one example of how *Qiyas* has been extended to cover all aspects of marital life:

> Sale of goods, or conducting business, during the time of the Friday congregational prayer is prohibited by the following verse of the Qur'an: "O you who believe! When the call is proclaimed to prayer on Friday, hasten earnestly to the remembrance of God, and leave off sales transactions."

> The *'illah* of this prohibition is that which, from the transaction of sale, detains one from proceeding to the Friday prayer and the potentiality of alienating one from the Friday prayer. This *'illah* has been deemed to be present in the transactions of lease, of mortgage, and of marriage. Therefore, the *hukm* upon these transactions during the Friday prayer is the same as that of sale.[106]

That many women are turning against these types of 'orthodox' Islamic laws, while remaining attached to Islam that is embodied in the Qur'an and the Sunnah, is an established phenomenon. Many Muslim men also find much of the detail of the law in question, especially those aspects derived using the all too fallible methodology of human reasoning (*Qiyas*), asynchronous with Islam itself. Contemporary Muslim scholars, especially those not trained in the orthodox tradition, are also challenging this legalism:

> [C]ontemporary Muslim scholars are impatient with these formalistic interpretations of the law which, on the one hand, enjoin the husband to furnish his wife with maids – an obvious luxury – but, on the other, exempt him from the responsibility for her medical care. To these scholars, this is plain mockery, casuistry, and abuse of the purposes of the law.
>
> Moreover, such formal interpretations contain no authoritative evidence. Nor do they seem compatible with the ordinances of the Qur'an and the Sunnah, which unequivocally call for kindness, compassion, and consideration. Here again, the question arises: were these jurists fighting windmills or tackling a real problem? How could they overlook the strong directives of the Qur'an and the Sunnah, and focus, instead on such a formalistic approach?
>
> The view that a husband may be exempted from the obligation of maintenance and payment for an indisposed wife's medical care cannot be explained in terms of any authoritative text from the Qur'an or the Traditions. Not only is there no such possible explanation, but also the very view is perhaps one of the clearest instances of 'deviation' from the orientation of the basic sources of Islamic law.[107]

It is important to understand that the misapplication of *Qiyas* is not an isolated occurrence. Al-Ati offers some insight into the direction that juristic works have taken over the centuries:

> Aside from the possibility of intellectualistic riddles or formal casuistries, this view, together with the accompanying analogy between wifedom and 'leased property' was probably a reflection of certain social and intellectual trends. ...
>
> The demographic composition of the Muslim population was growing diverse as well as complex. An urban life style on a new large scale, with the concomitant relative anonymity and individuality, was increasingly in vogue. Under such circumstances, marital bonds would be regarded not so much as alliances of families, clans, or tribes or as "companionship" ties as individual 'contracts' largely oriented to specific formal exchanges of service. *Women, as a rule, became increasingly secluded in the background and excluded from the world of men*. ... With the traditional mother role so depreciated, and with the companion role so contested by other rivals, probably little was left for the normal housewife other than being an object of sexuality. Even that role was not confined to her exclusively.[108]

The legal treatises reflect the tendency toward the "seclusion of women" from active life in their works. When entering marriage, does the wife regard and the husband expect that she should 'surrender' to the "custody" of her spouse? Or, is there any woman who expects that marriage basically entails her embracing a life of 'confinement' and 'seclusion'? This, unfortunately, is the way it would seem the jurists understood marriage and how they presented it in their legal interpretations:

> When a woman *surrenders* herself into the *custody* of her husband, it is incumbent upon him thenceforth to supply her with food, clothing, and lodging, whether she be a Muslim or an infidel, because such is the precept both in the Koran and in the traditions; and also, because maintenance is a recompense for the *matrimonial restraint*.[109]

The pertinent Arabic word is *ahbas*, derived from *habasa* (meaning: to block, detain, imprison).[110] This characterization, in the translation of Haskafi's *Durr-ul-Mukhtar*, is still more explicit and vivid:

> [M]aintenance is compensation for her *confinement*.[111]

Contrary to the legacy of the Prophetic period, as women became secluded in society and as they became 'confined' by juristic opinion Islamic legal discourse became isolated to and mired in legalism and literalism.

(e) *Peace Treaties with Non-Muslims*

Even though Islam is maligned for its supposed aggressiveness in dealing with others, in principle Islam seeks peace and justice and the reality is that the Prophet did not undertake any offensive campaign of aggression.

In keeping with universally recognized principles, Islam permits self-defense. This does not mean, however, that after the period of the Prophet and the rightly guided caliphs Muslims avoided aggressive campaigns throughout their history. The Qur'an repudiates offensive aggression:

> *To those against whom war is made, permission is given (to fight), because they are wronged*; – and verily, Allah is most powerful for their aid; (They are) those who have been expelled from their homes in defiance of right (for no cause) except that they say, "our Lord is Allah." Did not Allah check one set of people by means of another, there would surely have been pulled down monasteries, churches, synagogues, and mosques, in which the name of Allah is commemorated in abundant measure. Allah will certainly aid those who aid His (cause); for verily Allah is full of Strength, Exalted in Might, (able to enforce His Will). (*Surah al-Hajj*, 22:39–40)

The issue here is not merely with protecting mosques, but as part of its universalistic principles Islam is concerned with establishing justice and peace for all, including protecting churches, synagogues, temples, and so on. There are other verses that deal with the situation when

Muslims find fighting unavoidable or when they are engaged in war. If Muslims are committed to warfare they are to face their adversaries with valiance and determination, and to do everything possible to prevail over them. Even in such cases, Islam laid down strict rules that civilians (children, women, the old, and non-combatants) must not be harmed, the properties of others must not be destroyed and so on. Clearly, there are modern practical issues – weapons of mass destruction being one such aspect – that must also be taken into consideration.[112] However, at the very first sign of any genuine signal of peace Muslims have been obliged to reciprocate, as instructed by the Qur'an:

> But if the enemy incline towards peace, you (also) incline towards peace, and trust in Allah: for He is One that hears and knows (all things). (*Surah al-Anfal*, 8:61)

Indeed, let alone initiating aggression and reciprocating to peace gestures, Islam holds peacemaking (value No. 10 discussed in Chapter Two) to be among the highest of responsibilities:

> And make not Allah's (name) an excuse in your oaths against doing good, or acting rightly, or making peace between people (*an-Nas*, mankind); for Allah is One Who hears and knows all things. (*Surah al-Baqarah*, 2:224)

These principles and norms are made in the context of not only establishing peace, but also to ensure justice. In general, Muslims are obliged not to harbor prejudice against anyone – Jews, Christians, Buddhists, atheists, communists, animists, etc. – except in case of those who practice oppression and injustice:

> And fight them on until there is no more Tumult or oppression, and there prevail justice and faith in Allah; but if they cease, *let there be no hostility except to those who practise oppression*. (*Surah al-Baqarah*, 2:193)

It has also been argued that this verse was abrogated by other verses revealed later and thus such restraint on Muslims with peace-building as the norm is not applicable any more. While the scope of this work

does not allow a detailed discussion of the concept of *naskh* (abrogation), it is noteworthy that *naskh* is another misunderstood and misapplied concept in Islamic jurisprudence. To suggest that a verse has been abrogated essentially means that it has become unnecessary and has no more relevance than as a historical footnote in the revealed Qur'an. Indeed, it can then be argued that Muslims can simply delete those verses from the Qur'an, as they no longer bear practical relevance. This line of thought is untenable. Nothing in the Qur'an is irrelevant and somewhere, sometime people will determine the relevance of each of the verses based on their own life experience.

AbuSulayman explains:

> The Muslim student of today will notice that the concept of *naskh* in its traditional form actually came into conflict with many of the basic principles of revelation, actually nullifying or limiting the scope of their applicability to include only as much as was relevant during the second Madinan period.[113]

Referring to verse 5 in Chapter 9 of the Qur'an (*al-Tawbah*), AbuSulayman observes:

> [H]ere we discover that the traditional interpretation of *naskh* failed to derive the desired perspectives from this situation, those of reform, refining character, and meeting injustice and oppression with deterrent force. Instead, the traditional interpretation was carried over into the fields of *da'wah*, relations with others, and every other form of discourse with non-Muslims. By extracting similarities from these events, all sense of how to deal with equals, give doers of good their due, and soften the hearts of those who appear to be coming close to Islam is lost. Thus tolerance as a concept became a conditional value, one qualified and relegated to particular situations only, while the concept of limiting the individual's freedom of religious belief became a hard and fast rule.[114]

In fact, the theory and concept of *naskh* has added tremendous confusion and significantly damaged the Muslims' ability to think and approach issues of life consistently and coherently. This is because, in many cases, resorting to the theory of *naskh* has rendered vital verses in

the Qur'an irrelevant. Given the limitation of space here, we cannot delve into this in sufficient depth; however, this author's view concerning *naskh* is that no Qur'anic verse is ever abrogated. In this specific case, there is no meaningful evidence to render abrogated the verse that promotes the norm of non-hostility.[115]

One of the ways Muslims try to avoid war and conflicts is by entering into long-term peace treaties and the forging of cooperation for the common good:

> It is not righteousness that you turn your faces towards east or west; but it is righteousness to believe in Allah and the Last Day, and the Angels, and the Book, and the Messengers; to spend of your substance, out of love for Him, for your kin, for orphans, for the needy, for the wayfarer, for those who ask, and for the ransom of slaves; to be steadfast in prayer, and practice regular charity; *to fulfil the contracts/treaties which you have made*; and to be firm and patient, in pain (or suffering) and adversity, and throughout all periods of panic. Such are the people of truth, the Allah-fearing. (*Surah al-Baqarah*, 2:177)

Islam places stringent demands on Muslims to stand by their contracts, treaties and their promises. By the same measure, Islam also takes seriously the breaking or betrayal of treaties and covenants, especially when these are abrupt and unilateral in nature to the detriment of the Muslims:

> For the worst of beasts in the sight of Allah are those who reject Him: They will not believe.They are those with whom you did make a covenant, but they break their covenant every time, and they have not the fear (of Allah). If you gain the mastery over them in war, disperse, with them, those who follow them, that they may remember. (*Surah al-Anfal*, 8:55–57)

What is important to consider here is that Islam does not desire war; rather it inclines towards peace and justice. Towards these ends, Islam commands Muslims to find ways to establish and sustain peace and justice through treaties.

However, examination of the classical and traditional Islamic juristic discourse changes the picture dramatically:

> ... al-Shafi'i, in dealing with foreign relations, advises the Muslim rulers to *attack the mushrikun [polytheists] in their country at least once a year if not more often*, and not to accept a truce more than ten years. ...[116]

Although the Prophet did not personally conclude a truce that lasted more than ten years he did not rule out a longer period either. Neither did the Prophet advise that non-Muslim countries be attacked once a year or more. Incredible and shocking as it might seem, these sentiments are once again the product of *Qiyas* gone wrong. Thus, this is attributed to:

> ... *analogy* with the Sunnah of the Prophet, since the latter was engaged with his enemy in a battle at least once a year and did not accept a truce for more than ten years.[117]

It is an interesting point that the Prophet's engagement in battles, averaging out at almost one a year, constitutes the basis for *Qiyas* in an attempt to establish a norm. Of course, there exist variant juristic positions, like the Hanafi opinion that contradicts the Shafi'i ruling.[118] However, that the best of the Muslim scholars thought or argued like this needs to be more widely known and noted. The real issue however, is that the influence of these positions has not remained confined to the classical treatises of the past. Instead, the premises, attitudes, and understanding underlying these opinions continue to influence Muslim minds. AbuSulayman laments:

> It is understandable for the classical jurists to have engaged in literal analysis, a word-for-word and an issue-for-issue comparison and analogy in their arguments along the lines of these traditions, but when contemporary jurists function in the same manner and even repeat the old instructions word for word, there is obviously a lack of comprehension of the changes that have taken place.[119]

(IV) CONCLUSION

Analogical reasoning, *Qiyas*, is one of the most common methods human beings employ in all areas of knowledge. The Islamic scholars and jurists have also utilized it extensively, and in many cases it has been practiced brilliantly and effectively. However, in certain cases, especially when carried away by legalistic and literalistic tendencies, *Qiyas* has led to conclusions and laws that are inconsistent with the Islamic precepts, leading to its illegitimate application. This does not mean that there is a general problem with *Qiyas* as a methodology; it remains a valid component of the jurist's toolkit to formulate laws and codes. However, it is important to note that scholars need to be humble enough to disclose and disclaim that the product of such exercises is fallible. They also need to practice extreme caution in not becoming carried away when employing these tools of human reasoning. Furthermore, the discussion about *Qiyas* is also pertinent in the context of the discourse concerning the Shariʿah in general, where it is presented as divine and immutable, for many aspects of the Shariʿah rely on the practice of *Qiyas* which is an essentially human exercise in reasoning and there is hardly any element that is divine about it.

AbuSulayman makes another important point about the micro-level application of *Qiyas* to piecemeal issues without assuming a more holistic or systematic approach or perspective:

> *Qiyas* can no longer be partial or call for an issue-by-issue approach. It has to be systematic, conceptual, abstract, and comprehensive.[120]

The overuse or inappropriate exercise of *Qiyas*, especially in the search for the *ʿillah*, delinked from *hikmah* (rationale or wisdom) and lacking a systematic perspective, has contributed toward the current rigidity, legalism and dysfunctional behavior of the Muslim world.[121] *Qiyas*, or analogical reasoning, will remain a valuable part of the Islamic methodology of jurisprudence come what may. However, the authoritativeness attributed toward the method and toward its products has to be brought back down to a realistically defensible level.

Once again, a law does not become Islamic because of an exercise in *Qiyas*, which is speculative application yielding non-definitive outcomes. Instead, a law becomes Islamic when it meets ***all*** of the following conditions: (a) the formulation of the law must be rooted in the foundational sources of Islam, (b) it is derived with explicit attention to the *maqasid* and values of Islam, and (c) the adoption and enactment of the law by the society occurs through *shura* (consultation). Kamali, an eminent contemporary scholar of Islamic jurisprudence, remarks:

> Wisdom and application of 'good sense,' rather than a mechanical or fixed set of logical rules, is recommended in the determination of *ratio decidendi*. ... But the rigidity that the Muslim jurist tried to avoid in this instance was visited upon him through the imposition of burdensome technicalities on *Qiyas*. The correct advice in both instances is surely to avoid rigid conformity to precedent at the expense of losing sight of the broad purpose and objective of the law.[122]

The present generation of scholars needs to follow in the footsteps of the original scholars of Islam by disregarding their mistakes and building on their successes – theirs has been a vital contribution to the systemization of the various Islamic codes and laws, after all. The original scholars in every epoch have approached their pertinent field of interest with the highest regard to the past generations and the contributions they made to Islamic knowledge. By the same token, they also never wavered in identifying mistakes, whenever applicable, and in turning to the Qur'an and the legacy of the Prophet, as well as resorting to human reasoning and conscience, to offer newer or improved perspectives and articulation.

Theirs are the footsteps and theirs is the approach we should follow today. The vast treasure of knowledge and wisdom left behind by the earlier generations of brilliant and noble scholars must be respected, learned and applied, but this time in a forward-looking manner. The new generation of scholars must correctly discern the issues affecting the current period and endeavor to shape the future not merely through the lens of the past generation of scholars and their works, but

through the lens of the Qur'an and the Prophetic legacy. By doing so, the Muslim forebears will neither be disrespected nor will their works be discarded. Instead, following their lead is the way to ensure that they remain honored and paid homage to. Thus, it is vital that a forward-looking approach and perspective, one guided by the Qur'an and the Prophetic legacy, and enriched by the critical appraisal of the scholastic heritage and achievement of the past, should form the basis of both present and future imperatives to meet the challenges of a new age.

CHAPTER 6

Islamic Fiqh (Law) and the Neglected Empirical Foundation

MUSLIMS believe that Islam constitutes a comprehensive guide for life in this world. Based on the Qur'an and Sunnah,[1] Muslims maintain that they possess the final divine guidance to address the problems encountered in human life in order to live in a balanced and successful way. For more than a millennium since the death of the Prophet, the Islamic civilization was pre-eminent in the world. However, decadence gradually crept in and now Muslim societies are virtually dysfunctional and, due to internal as well as external factors, unable to solve most of their problems on their own, never mind being able to compete with the developed world.

Today, Muslims hold many fond memories of their glorious past. However, the vast body of inherited Islamic legal knowledge and codes is now asynchronous with the realities of our contemporary age. Even though it is claimed that Islam stands for justice, and, in principle, this is certainly true, many Muslims in their own societies are victims of the burden of legalism and insensitivity conducted in the name of Islam. Women are a case in point. Many, for example, especially those from a social strata which lends them no meaningful power or status, have been victimized under the Hudood Ordinance which prevails in some countries. The lives of many others have been almost instantly devastated due to the common application of divorce laws or codes mostly based on pre-Muhammad traditions.[2] Despite the provision of a *mahr* (the Islamically decreed marriage gift) women hardly gain any economic security through marriage, a rude reality which they wake

up to once they encounter divorce. Or take the example of usury for instance. It is claimed that interest is prohibited – *riba* being forbidden and equated to interest – therefore there is an assumption that the Islamic economy and related finance must be interest-free. Why then do the products and services designed and offered by the present Islamic financial institutions merely mimic or shadow conventional financial systems?[3]

A host of different pertinent questions around these and related issues needs to be asked. For example, why the gap between existing Islamic laws and the reality on the ground in terms of solving problems and upholding the Islamic principles of justice and balance? Why, indeed, are the Islamic laws – as enunciated by Muslim jurists who often make the claim that these are based on guidance from God *for all time* – constantly in need of invoking the principle of *darurah*, for example, to expediently reinterpret or readjust for what is presented or claimed as being the norm? Why are many Muslim women revolting against some of the key provisions in the classical laws, turning instead towards secular laws or challenging the traditional Islamic establishment in their bid to claim justice, seeking the proper and dynamic implementation of Islam? Why are Muslims searching for greater freedom in their own societies, when the claim is that Islam is at the vanguard of human dignity and freedom? Why are Muslim societies encumbered with the problem of widespread poverty and destitution, outdated education, as well as technological backwardness? Although it could be argued that the true spirit of the Shari^{c}ah is being violated by a deliberately crude interpretation favouring the dictates of corrupt regimes nevertheless a legalistic mindset fuelled by a fossilized, static outlook plays its own and critical part in allowing this to happen.

It is important to grasp that in attempting to gain an understanding of these issues the fact needs to be recognized that Islamic law or fiqh lacks a systematic empirical foundation (the term empirical here must not be confused with the narrow sense of empiricism – the practice of relying on observation and experiment alone).

However, a pertinent observation about the corpus of Islamic law is that it is text or book-oriented, rather than life-oriented. Even though El Fadl applies the term "text-centered"[4] in the context of

fundamentalism and extremism, text-orientation remains the hallmark of Islamic law in general. To illustrate, Mahmoud El Gamal, an acknowledged scholar and expert in the field of Islamic economics and finance, articulates how through ijtihad the dynamism of Islam is to be ensured:

> It must be understood that when we claim that Islam has a satisfactory solution for every problem emerging in any situation in all times to come, we do not mean that the Holy Quran and Sunnah of the Holy Prophet or the rulings of Islamic scholars provide a specific answer to each and every minute detail of our socioeconomic life. What we mean is that the Holy Quran and the Holy Sunnah of the Prophet have laid down the broad principles in the light of which the scholars of every time have deduced specific answers to the new situations arising in their age. Therefore, in order to reach a definite answer about a new situation the scholars of Shariah have to play a very important role. They have to analyze every question in light of the principles laid down by the Holy Quran and Sunnah as well as in the light of the standards set by earlier jurists enumerated in *the books* of Islamic jurisprudence. This exercise is called *Istinbat* or Ijtihad... [T]he ongoing process of *Istinbat* keeps injecting new ideas, concepts and rulings into the heritage of Islamic jurisprudence...[5]

However, all such juristic and scholarly analyses are to be guided primarily by the principles laid out in the Qur'an (considered a revealed text – but a text nevertheless), the Sunnah (as ascertained by the numerous Hadith collections of various stature – again a collection of texts) and the books of Islamic jurisprudence (more texts representing the various Islamic schools of thought, often in disagreement with each other – yet more texts). Noticeably, there is no hint of conducting research based on the real world beyond consulting the relevant texts or books in 'deducing' specific answers. Furthermore, there appears to be no hint of any role involving an inductive approach, studies or research; instead everything revolves around the Islamic texts, attendant books and associated deductions.

This propensity towards text-orientation is further reinforced by the application of archaic Islamic educational models. Tariq Ramadan makes the following comments in the context of Islamic education in

the West – the condition of Islamic education in the Muslim world being far worse:

> [W]e find in this education the two failings against which the Islamic message has warned us ...: the reduction of spirituality to ritual technicalities, and the adoption of a dualistic and Manichean approach based on 'us' as opposed to 'them.' This extends over to the life of the Prophet (in which one might have hoped for a human approach), which is reduced to a series of dates and events without real substance: one would have liked the young to love 'model,' but he has been almost completely dehumanized by the content of the teaching.
>
> The educational methods are not much better. While the public school system teaches children to express themselves, give their opinions, and articulate their doubts and hopes, the exact opposite is found in some mosques and Islamic organizations. Here, one must be quiet and listen: there is no room for discussion, exchange or debate, an unhealthy schizophrenia, in which they learn to express themselves on every subject with 'non-Muslims' and become dumb (by giving the appearance of 'religiously' respecting everything they are told) when it comes to speaking about Islam or interacting with their religious teachers. They play the game of an education that has in fact lost its way. If we consider what is usually offered today to generations of young Muslims in the West, we become convinced that what is called 'education' (which should be the passing on of knowledge and of knowing how to be) is in fact an ill-administered 'instruction,' simply a handing on of knowledge based on principles, rules, obligations, and prohibitions, often presented in a cold, rigid, and austere manner, without soul or humanity."[6]

To ensure that the Islamic guidance regains its relevance and becomes effective once again any solutions will have to involve a qualitatively better understanding of the problems at hand based on life-oriented education coupled with empirical research. In this work several problematic areas have been explored by way of illustration. A case has been made for the need to enhance Islamic fiqh by adopting a life-oriented, empirical approach and to this end some pertinent suggestions are given here.

(I) FORMULATION OF ISLAMIC LAWS: THE TEXT-ORIENTED APPROACH

Islam is more than simply a collection of laws even though in any functioning society, quite naturally, there would always be a need to develop laws, codes and standards to ensure societal stability and structure. However, as explained earlier, contrary to Islamic principles and the vision of Islam, over time legalism has overwhelmed Muslim societies. This helps explain why whenever the call for introducing the Shari^{c}ah is made, resulting in some form of implementation (as has happened in several Muslim-majority countries in the twentieth century), this basically amounts only to a few harsh laws and punishments under authoritarian regimes devoid of reference to broader Islamic values and principles. My goal in this study has been to question this intellectual slavery to the past and cross-examine interpretations that they may have served well in their time but which are awkwardly placed in today's society. Excessive legalism is not the fault of the Shari^{c}ah but the infallibility of our own selves, an issue of our own making. Islam in reality is open to a dynamic and intellectual interpretation if only given the opportunity to realize its potential.

Text-centeredness or text-orientation has not only been hugely responsible for the loss of dynamism of Islam and its laws, but it has also led to those non-Muslims who have studied Islam to be vulnerable to misunderstanding the belief and prone to misinterpreting it:

> By approaching Islamic law reductively as a text-based tradition, colonialists could attempt to 'understand' the Muslim and Islamic experience by mere reference to text, while ignoring the significance of context and contingency that is often taken into account in working rule of law systems.[7]

While many colonialists possessed their own ideological prejudices even Muslims could not escape the impression that traditional Islam is reductively legalistic, encapsulated in layers of primary, secondary and tertiary texts, very often disconnected from the stark realities of life.

The edifice of Islamic fiqh (laws) is primarily text-oriented: the first and primary foundation of Islamic fiqh being the Qur'an – the infallible revelation sent directly by God without dispute among the Muslims. As a revealed text, anything found in support of or held as guidance for something, will supersede all other sources. The second source of Islamic fiqh is the Sunnah, consisting of the sayings and practices of the Prophet, as preserved through the Hadith collections. In most cases, the Qur'an merely lays down general principles or directives without defining matters further or providing specific details. Muslim jurists turn to the Hadith to determine definitions and to identify greater detail. There is some controversy concerning the nature of Hadith even among Muslims. The majority of Muslim scholars insist that if there is any particular information in a hadith, especially the *sahih* (authentic) Hadith, then the commandment or directive is binding. However, as already explained in Chapter Three, Muslim jurists themselves also generally acknowledge that Hadith (*sahih* or otherwise) only yield speculative or probabilistic knowledge. There are a number of Hadith collections that are more or less universally regarded as authentic, or relatively more authentic. Six primary ones are known as the *al-sihah al-sittah*. Muslim scholars and jurists turn to these and other Hadith collections in their deliberations over what is obligatory, permissible, disliked, prohibited and so on.

The third source of Islamic fiqh is Ijmaᶜ (consensus). Essentially, this is an integrative source in the sense that if there is a consensus on an issue it is regarded as Islamically authoritative, binding and incontestable. Unfortunately, as demonstrated in Chapter Four, Ijmaᶜ has been consistently seriously overused and misused because there is no apparent consensus over what constitutes the definition of Ijmaᶜ. Indeed, beyond some of the broad principles or dogmas and some basic rituals, there is hardly anything on which there exists an Ijmaᶜ. Ijmaᶜ also lacks applicability in the contemporary world because there is no way to achieve consensus in a strict, classical sense. However, regardless of its definition, in ascertaining Ijmaᶜ the jurists still turn to the primary textual sources – the Qur'an and Hadith – thereby realizing Ijmaᶜ as a text-oriented source in itself.

The last source of Islamic fiqh is *Qiyas* – analogical deduction or reasoning. *Qiyas* is the application of known laws or codes to new situations. "The function of Qiyas is to discover the cause or *ʿillah* of the revealed law so as to extend it to similar cases. Wine drinking, for example, is prohibited by explicit text. The cause for the prohibition is the intoxicating effect, hence in whatever this cause is found prohibition will become applicable."[8] Since validation of *Qiyas* is also primarily dependent on textual sources, then it happens that the entire edifice of Islamic fiqh relies on a thoroughly text-oriented approach. Ijtihad (juristic interpretation based on the application of *Qiyas*) is one of the key aspects of Islamic fiqh that allows for re-interpretation and adjustment in light of new problems, but even the need for ijtihad causes the jurists and scholars to return to the Islamic texts in the search for ever more appropriate guidance.

An apparent essential deficiency of most traditional Islamic fiqh is that while Islam is meant to guide its adherents to find solutions to problems there is little recognition of the need to research, study and understand the nature and scope of these problems and they are treated as if they are already known and adequately understood. Empirical research is not a built-in process of the education or the experience of Muslim jurists and scholars in general. Just as research or empirical work conducted to fully appreciate a problem before formulating or enacting a law is virtually absent in this context, there is also an absence of research or empirical work geared towards determining the effects and consequences of particular legal formulations and enactments.

The traditional institutions of higher Islamic learning have no established social studies or social science research elements that make up a prominent or integral component of their overall educational curricula. Even those modern educated Muslims who take Islam seriously rarely show an interest in empirical social research. Thus, is it little wonder that so many Islamic laws are found to be connected to the sacred texts, but disconnected from the reality on the ground? What follows is an examination of some of the more prominent examples of this situation to illustrate just how the application of classical Islamic law has become divorced from the pristine Islamic values and principles of justice and balance.

1. *Zina and Hudud Law in Pakistan*

In 1978, under the military rule of the late General Zia ul-Huq, the government of Pakistan decided to implement the Shariʿah under the project called *Nizam-e-Mustafa* (Islamic System) and in 1979 the Enforcement of Hudood Ordinance. Unfortunately, theirs was a very partial, misunderstood, misinterpreted and, consequently, misapplied version of the concept. The legislators concentrated on promulgating the *hudud* aspects of the Shariʿah – *hudud* (the plural of *hadd*) consists of a few boundary limits for what is specified as being Divinely lawful and unlawful, the violation of which incurs punishment. The *hadd* punishments are particular, fixed penalties laid down by Allah for specified transgressions or crimes. In realizing this objective, a comprehensive Hudood Ordinance was enacted which included "The Offence of Zina" (Enforcement of Hudood) Ordinance VII of 1979 – *zina* (adultery or fornication) is prohibited in the Qur'an constituting a punishable offence. Ordinance VII defined *zina* in a much more liberal way, maintaining that the term meant either adultery, fornication, prostitution or rape. Thus, rape became a form of *zina*, *zina bi al-jabr* (or *zina* by force).

This was a gross violation of the concept, a mockery of the spirit of Islam, and an outrageous misapplication that had disastrous consequences for women. By mixing up adultery and rape, through the categorization of rape as a subcategory of *zina*, Pakistani women woke up to a nightmare situation wherein thousands who had claimed they were the victims of rape, ended up being prosecuted under the laws pertaining to adultery! The law was formulated directly and exclusively from religious texts, without any research undertaken as to its effect after enforcement. There was, not surprisingly, uproar among the conscientious, including many who took Islamic principles and values seriously. After the subcategory had been implemented the religious establishment and educational institutions did not conduct any analysis as to its impact apparently satisfied that the Hudood Ordinance was in place, and, thus, God's work was being done. Not only did they fail to study or be informed about the consequences of this law, but also chose to turn a deaf ear and a blind eye to all the protests as well as the

results of later social field studies. It has taken more than 25 years for the nation's Islamic scholars just to acknowledge that there are serious problems with the nation's *hudud* laws.

Typical Case: Mst.[9] Sukhan:

> The father of Mst. Sukhan filed a complaint stating that his daughter had been abducted by three persons. At trial, all three accused of abduction were acquitted. Mst. Sukhan was convicted for Zina. Mst. Sukhan was initially treated as a prosecution witness being the abductee. It was during the investigation that on the directions of the Deputy Superintendent of Police, the investigating officer Muhammad Ibrahim arrested Mst. Sukhan on 27–12–81 as an accused person because she was involved in the case. The Chemical Examiner's report found stains of blood and semen on the garments of the abductee. The trial court argued that since the abductee was kidnapped for three months and was not in the company of her husband, the presence of blood and semen were proof of her guilt. The abductee, however, alleged that rape had been committed on her at the police station. On appeal the Federal Shariah Court acquitted Mst. Sukhan.[10]

The case of Mst. Sukhan ended on a relatively happy note as she was acquitted. However, the issue remains as to why the victim had to endure criminal prosecution to begin with. Moreover, not every case brought under the *hudud* law ends this way. Being acquitted is a just outcome, but this is simply not good enough in respect of the years of confinement, lost social standing, and even familial abandonment suffered by the victim:

> Of the 7,000 women in jail around the country awaiting trial, 88 percent are accused of crimes under Hudood, according to the Lawyers for Human Rights and Legal Aid. Ninety percent of these women have no lawyer, and 50 percent do not know they are entitled to contact one. Most women accused of Hudood violations are acquitted, but lose an average of five years to confinement, and lose their reputations as well.[11]

Jahangir and Jilani's work, based on well-documented research, is an excellent example of the kind of studies the Islamic scholars and

institutions should be capable of undertaking. It is argued here that in the eventuality that these are not able to undertake the studies themselves, then at least there should be an expectation that they keep abreast of any research or study pertaining to the laws and codes they help promulgate.

Lest there is any misunderstanding my intention is not to blame the Shariʿah on an intrinsic level, for Muslim scholars both within and outside Pakistan have categorically renounced this practice as against the principles of the Qur'an and the Sunnah of the Prophet. In addition it is not my intention to use this critique as ammunition against the Shariʿah in the broader sense with a view to abolishing it or questioning its validity, as those against Islam are only too happily doing. Rather my contention is that all Islamic laws requiring human interpretation are to be formulated with due human sensitivity, applied holistically, keeping faithful to the overall objectives of the Qur'an and the Sunnah, moral, social, and spiritual, with a view to the welfare and protection of mankind and the promotion of justice, peace and harmony. A purely text based approach which takes no account of the overall picture or indeed human life opens the door to misapplication and abuse.

2. *Triple Talaq (Divorce)*

In the same vein we have the issue of the triple *talaq*. Although this practice is clearly contrary to the teachings of the Qur'an and the Sunnah, its pronouncement as nullifying marriage in one stroke has been recognized in classical fiqh literature as valid and effective. The reason being that the second caliph, ʿUmar ibn al-Khattab, enforced the ruling without, it is claimed, the other Companions of the Prophet disagreeing with him. As this is viewed as constituting an Ijmaʿ (consensus) on the judgment, it is thereby regarded as valid and disallowing or proscribing it is regarded as going against the Ijmaʿ.[12]

In point of fact, there is no Ijmaʿ on this point and there is little reason to suggest there could be due to the lack of an agreed upon definition concerning whose opinion is counted towards Ijmaʿ. To frame the matter exclusively from the standpoint of whether there

exists an Ijma^{c} on the issue or not is consistent with employing a purely text-oriented approach which ignores Islamic principles. Once again it is women who suffer the consequences. A complementary, life-oriented approach would require that the spirit of the Qur'an and the Sunnah is kept intact and the sanctity of marriage safe-guarded. If skeptics require evidence they need only conduct research and study into the effects both mental as well as social that result not only on individuals but society at large as a result of the triple *talaq* practice.

The reality is that, even though it is highly questionable, traditional Islamic law has granted the right to divorce primarily to men. This is turn has been creatively interpreted by husbands and some scholars. A husband can divorce his wife at any time, using any possible means (verbal, written, e-mail, voice message, etc.), under any circumstances (angry, drunk or coerced) without being required to give any excuse, grounds, or reason to anyone and without the requirement for witnesses.[13] That a witness is not required according to traditional Islamic law directly contradicts the Qur'an:

> Thus when they fulfill their term appointed, either take them back on equitable terms or part with them on equitable terms; and *take for witness two persons from among you, endued with justice, and establish the evidence (as) before Allah*. Such is the admonition given to him who believes in Allah and the Last Day. And for those who fear Allah, He (ever) prepares a way out. (*Surah al-Talaq*, 65:2)

The only limited right women have in seeking a divorce is primarily through a structured legal process, subject to many conditions and restrictions, which many women find extremely cumbersome. The literalist or legalistic approach is quite insensitive to female problems and suffering, as the following events from nineteenth century India demonstrate.

In the early 1900's, many Muslim women seeking divorce found it extremely difficult. Indeed, in some cases, the only option left to them was apostasy, in which case, according to Hanafi law, the marriage stands annulled. This became a great tool for the Christian missionaries to entice Muslim women towards Christianity in order to obtain a

divorce. The religious establishment, led at the time by Maulana Ashraf Ali Thanvi, was initially utterly insensitive. It is quite mind-boggling that in the first place the apostasy of Muslim women was favored over their ability to divorce despite the permissibility to do so accorded to them in the Qur'an:

> And their husbands have the better right to take them back in that period, if they wish for reconciliation. And *women shall have rights similar to the rights against them*, according to what is equitable; but men have a degree (of advantage) over them. (*Surah al-Baqarah*, 2:228)

However, as the momentum for seeking divorce through apostasy grew to an alarming level, the religious establishment did not address the underlying injustice according to the traditional Islamic law of divorce. Instead, they resorted to *talfiq* (mixing the juristic position of more than one school) closing the door to large-scale conversion by issuing a fatwa that stated conversion did not annul the marriage.[14]

The following is an illustrative case that is not uncommon in our contemporary time.

Typical Case: Ameena:

> Ameena, a young telephone operator in Delhi, came home one evening to find her husband in a clinch with another woman. Even before she could collect her wits, he turned on her and pronounced talaq thrice. Ameena's marriage of six years was over. Worse, he refused to pay her maintenance beyond the iddat period (three menstrual cycles). Today, two years later, thanks to the Muslim Women (Protection of Rights on Divorce) Act of 1986, Ameena still awaits her due from her husband.[15]

According to traditional Islamic law once a triple *talaq* is exercised at least in line with the rulings of some of the schools it becomes irrevocable and the divorced wife is basically on the street.[16] Ironically, although divorce is allowed in Islam, the act is considered extremely undesirable and thus has been designed to be difficult. However, as far as men's rights and privileges to divorce are concerned this does not apply. Even more ironic is the fact that though the jurists and scholars

dislike it they demonstrate no desire or urge to study the factors (social or otherwise) that contribute towards marriage breakdown and the way in which these could be addressed to ensure greater marital harmony.

In adherence with the evidence contained in the Qur'an and the Sunnah, triple *talaq* at one stroke should be considered prohibited and Muslims should seek its complete ban. Unfortunately, research studies undertaken by the religiously orthodox to learn of the impact and trauma that this practice has had on the lives of divorced women, and their families and children are conspicuous by their absence. The *ʿulama'* aside even Muslim intellectuals have failed to research the issue to any great degree often too engrossed with polemical Islamic works, although human rights and women's groups have campaigned for the protection of women and publicized the effects of this instantaneous divorce. Whatever studies are available have mostly originated from western scholars or secular researchers in Muslim-majority countries. However, a new breed of Islamic feminist scholars, alongside their western trained Muslim colleagues, are now stepping forward to make a difference to this field. Conversely, religious institutions of higher learning still remain hide-bound to tradition not recognizing the need to integrate research and social studies into their curricula.

3. *Social Implications of Traditional Inheritance*

The classical Islamic law of inheritance is fixed and rigid. The Shari*ʿ*ah stipulates that surviving family members and relatives have designated shares, determined exclusively in reference to the textual sources. There are no modern studies to investigate the impact of these laws on particularly women, who generally constitute one of the most vulnerable segments of society. It is well known that men can easily walk away from family relationships and obligations; also known is the fact that women cannot. Despite idealized claims, the fact is that after divorce or bereavement unless a woman possesses her own accumulated assets or resources, she cannot meaningfully count on anyone. More importantly, traditional Islamic authorities do not recognize the need for or virtue of a women's ability to be self-reliant because it is

deemed, and argued, that she will always have the support of someone: whether it be her father, husband, brother, son, or the government and society. Without pertinent empirical social studies to explore the nature and extent of the problem arising from the rigidity of the inheritance laws there is no way to begin to appreciate the misery and vulnerability of many women, especially those among the poor.

The role of jurists and scholars should not reside solely within the realm of texts. An ivory tower approach which merely focuses on formulating and enacting laws whilst ignoring the principles of the Qur'an and Sunnah, is one that can lead to misery for many. It is imperative that scholars are conversant with the problems they attempt to address and the effect of the laws and codes they derive. It is not enough to claim that a woman is entitled to inherit and own property, receive a marriage dower (*mahr*) or manage her own assets and income under Islamic law. Instead, those qualified to do so need to study what happens in real life, to real life people, to determine why a serious gap exists between the reality and the higher objectives of laws. It is only then they will be able to address the gap.

Moors and Tripp for instance have written an excellent study of the experiences of Palestinian women with regards to property and Islam. It is the type of empirical research that religious scholars and institutions should be undertaking, if not themselves then through sponsorship of those capable, to truly explore the findings, understand the human condition and develop ways of improving it.[17]

4. *Marriage of Minors (Health and Other Issues)*

The marriage of minors was a practice inherited from the prevailing customs in Arabia that preceded the advent of the Prophet. Today, in some Muslim cultures, puberty is often regarded as a normal marriageable age. However, the marriage of minors fundamentally contradicts the liberty and human dignity of the individual – wherein a person is denied their own choice concerning one of life's foremost decisions. Assuming that the marriage of minors is allowed (which as a Muslim and human being is difficult to reconcile), the sad reality is that Muslim jurists have not studied the impact of these marriages, especially on the affected girl's health, sanity and other pertinent aspects.

Examples abound, a family who came to the US as immigrants from a South Asian Muslim-majority country, delivered their daughter, who was less than sixteen years old, into marriage. Not only was the girl incapable of handling the responsibility of a newborn, but she became angry at herself and her family because of her situation. She developed schizophrenia and continues to suffer from debilitating symptoms. While this is a very real but anecdotal case, the experience is not uncommon and accurately depicts the plight of many girls married at an early age without their consent. Since the culture of most Muslim societies is such that the groom's extended family accommodates the bride, there are significant emotional and associated problems for immature wives in this situation to deal with.

An empirical study in Iran that investigated tribal women found certain gynecological problems to be more prevalent, the suggestion being that marriage and childbearing at an early age contributes to medical conditions:

> Gynecological problems related to childbearing were studied in 1010 married women of the semi-nomadic Qashqa'i tribe. The most common problems were cystocele (56.0%), uterine prolapse (53.6%) and rectocele (40.4%). The prevalence of other problems such as cervical erosion and inflammation, urinary incontinence and dyspareunia was found to be between 24% and 40%. Early age at marriage and childbearing, high parity and poor access to medical facilities are considered to be the most important factors leading to these high prevalence rates, although the lifestyle of the women in this community could also be a major contributing factor.[18]

In another empirical work examining the factors affecting divorce in a traditional Muslim community in Bangladesh it has been found that:

> The groom's and bride's low socio-economic status, illiteracy, and early age at marriage increased the odds of divorce.[19]

Many Muslim-majority countries have already legislated a minimum age for girls and boys for marriage:

> No specific age for marriage was mentioned either in the Quran or in the traditions of the Prophet. It is true that the Holy Quran speaks about "the age of marriage," but it does not determine any particular age, and so leaves its determination to circumstances and climatic conditions. Every community is thus given the right to determine the age of marriage deemed fit and suitable for the growth of its individuals.[20]

> In Islam there is no fixed age of marriage, although some Muslim countries may have enacted legislations fixing a minimum age. In some texts of fiqh (e.g., Al-Ajali's *al-Sara'ir Fil-Fiqh* and Hilli's *Shar'i al-Islam*) there is a mention of age nine, without explaining why and on what grounds this age was based.[21]

> Most Muslim countries today have legislated to provide a minimum age of marriage. For example, the minimum age of marriage is 21 for males and 18 for females in India; 18 for males and 16 for females in Pakistan and Malaysia and several of the Arab states …[22]

These legislations often have come about due to pressures from outside, and without the support of, the religious establishment, creating further rift between the traditional religious position and the forces within the Muslim societies that point to the accumulated human experience. The traditional approach to such issues is that the Qur'an mentions about "the age of marriage" (*balaghu-nikah*, *Surah al-Nisa'*, 4:6) and this is generally identified with the age of puberty. However, since the Qur'an does not specify any particular age for marriage, and human experience in terms of any demonstrated negative effect on early marriage should be taken into account, Islam leaves it to a society to develop its own dynamic or experience-based standard in this regard. Such standard-setting, of course, requires guidance from the Sunnah as well as empirical social research over a long period.

Of course, any empirical work can be countered with alternative empirical studies, especially if these are used to support a preconceived notion or fit an already formulated conclusion. There is bound also to be a learning curve involved in complementing Islamic fiqh with an empirical foundation. However, exploring the extent to which a problem exists or not is the responsibility of those who formulate

Islamic law. And, in spite of their text-oriented approach, if scholars could integrate social research programs into their education, training and praxis they would do a much better job of this.

5. *Birth Control (Frequent Pregnancy)*

The Muslim world is a recognized region of strong population growth. Several Muslim-majority countries, including Bangladesh and Pakistan, are listed among the states that combine large populations with widespread poverty. As a result these countries breed further poverty. For the vast majority of people, their quality of life is one of stagnation maintained at a miserably low level or continued deterioration. The religious establishment has generally been against any kind of birth control policy or program. The reason for this is that contraception is considered inconsistent with Islam as life and death are held to be determined by Allah, therefore human beings should not try to interfere with or influence the reproductive process.

However much the rhetoric of justice and humanitarianism (*insaniyyat*) is invoked, the reality is that what constitutes the permissible or prohibited aspects of Islamic law is determined by whether it is supported or corroborated by Islamic textual sources, rather than by taking human factors into consideration. Muslim jurists, generally comprising an all male circle, are unlikely to adequately comprehend what women experience during each pregnancy or how overbearing it is to regularly produce children so many times during their most fertile years. The health of both women and their children is affected because mothers are unable to attend to their physical and emotional needs. This is further exacerbated by the tendency for Muslim cultures to be patriarchal therefore resulting in an environment where childbearing and child rearing are left to the women. Too many families are fated to lead impoverished lives because of their large size and archaic cultural attachments. The jurists are aware of these issues, but have not spared sufficient effort to study much less address them.

Islamic jurisprudence consists of certain principles that allow for adjustments to be made even to the pronouncements that occur in the sacred textual sources, these include: *maslahath* (public interest), *istih-*

san (juristic preference), *darurah* (necessity), etc.[23] Each of these juristic principles (amounting to secondary methodologies) has provided some dynamism to the process of ijtihad. Yet even with these additional tools Islamic law and jurisprudence has remained essentially "micro-juristic" – pertaining to issues and concerns of individual believers.[24] Moreover, for a way of life that is considered comprehensive, the toolkit remains too poorly kitted out to deal with all the problems and challenges of life effectively and with sufficient dynamism. AbuSulayman aptly points out:

> Since the methodology of Islamic thought is distinguished by the comprehensiveness of its scope of application, it needs also to be distinguished by the comprehensiveness of its means. Life, in all its aspects, is the field of application for Muslims. In it they are obliged to understand, to seek knowledge, and to strive with every means at their disposal to direct the affairs of their lives toward their goals. Among the sound means of acquiring knowledge and understanding there are none that Muslims are to ignore, whether these be material, semantic, artistic, scientific, empirical, rational, quantitative, qualitative, theoretical, or analytical.[25]

Without conducting research based on the exigencies of real life, all legal rulings, prescriptions and proscriptions are deduced according to a text-oriented manner, where the arguments are asynchronous not just with reality but also some of the important teachings of the Qur'an. To illustrate, in the first place, the Creator states that men and women should not marry unless they can support a family. And until God makes the people concerned financially able they are commanded to maintain their chastity instead; "Let those who find not the wherewithal for marriage keep themselves chaste..." (*Surah al-Nur*, 24:33). Interestingly, this straightforward position conflicts with the traditional viewpoint whereby it is held that any effort to link family size to the family's ability to provide is tantamount to saying that Allah has placed no responsibility on our wisdom, common sense or conscience concerning our unbridled reproduction. In other words, it is as if we Muslims have no responsibility for providing even the basic minimum for our children.

Furthermore, the Qur'an has specified the norm that mothers should nurse their babies for two full years; "The mothers shall give suck to their offspring for two whole years, if the father desires to complete the term" (*Surah al-Baqarah*, 2:233). The physical and emotional benefit of nursing a baby for so long is indisputable. However, the corollary is that if a mother is supposed to nurse each infant for two years, then her pregnancies should be at least two years apart.

Once again these constitute text-oriented arguments or evidence, serving to illustrate the serious lapses in the traditional Islamic position even though the position originates from textual sources. Indeed, the apparent confusion regarding the sources of Islamic knowledge and pertinent research methods, as well as the associated research tools, needs to be addressed:

> Historically, Muslims wasted a great deal of energy when they began to discuss matters of the unseen, theology, and philosophical sophistries having to do with issues like the divine predicates. ... It is important that, in this study of Islamic methodology, we should not confuse the sources of Islamic knowledge, which are *wahy*, reason, and the natural laws of the universe, with the means for conducting research and study. Every scientific field has its own means which are particularly suited to it. Clearly, the Islamic disciplines must be based on *wahy*, reason, and the laws and standards that Allah has imposed on creation. Thus grounded, the new Islamic disciplines will be distinguished by their comprehensiveness and openness to any means capable of producing knowledge beneficial to humankind.[26]

While it is clear there is a need to refocus the purview and attention of Islamic juristic study towards empirical research to address the social reality there is also a need to distinguish between macro and micro effects. In this respect, at one level Muslim jurists need to be sensitive to issues concerning women's health and other related factors. On a quite different level, they also need to take into consideration the overall negative effects of explosive population growth on the economy and society, especially in a globally competitive or contentious environment.

6. *Polemics of Islamic Economics and Finance*

The one contemporary field that has witnessed the clear influence of empiricism is the field of Islamic economics and finance – disproportionately affecting finance more than economics. The Islamic banking and finance movement has emerged as a noticeable phenomenon within Muslim-majority countries as well as having become part of mainstream financial operations in the West. The entire movement emanated from the premise that a modern economy and financial system is based on interest and that blanketly equating interest with *riba* (usury) consequently leads to the system being regarded as prohibited. Therefore, many among the revivalist forces wish to see an interest-free economy.

Due to the dichotomy between religious and secular education, few Muslim jurists and scholars are adequately familiar with the field of modern economics and finance. This shortcoming apparently does not deter them from issuing *fatawa* (juristic opinions from a religious perspective) on the subject nonetheless. Help is at hand though in the form of a new generation of academics and practitioners from the field of economics and finance. These experts assist the jurists to better understand modern realities and processes. They are also involved in undertaking pertinent empirical work. The question is, how has this arrangement affected the understanding of the jurists and scholars concerned? In this respect, three illustrations are presented below.

(a) Yusuf al-Qaradawi is acknowledged as one of the leading contemporary Islamic jurists and scholars. His thoughts and views evoke a modernist tone, while there exists within them an unmistakable deep commitment to Islamic authenticity. In general he delineates a moderate position concerning most of the issues of our time and is highly respected by the current generation. His fatwas are sought on a variety of contemporary issues, including opinions that encompass Islamic economics and finance. He has been the Dean of the Islamic Department at the Faculties of Shariʿah and Education in Qatar, and is the head of the European Council for Fatwa and Research. His book, *The Lawful and the Prohibited in Islam*, is popular among Muslims because of

its modern perspective. In the book he writes concerning the wisdom of prohibiting interest:

> The strict prohibition of interest in Islam is a result of its deep concern for the moral, social, and economic welfare of mankind. Islamic scholars have given sound arguments explaining the wisdom of this prohibition, and *recent studies have confirmed their opinions*, with some additions and extensions of their arguments.[27]

Interestingly, but not unexpectedly, there is no reference or further information regarding these "recent studies [that] have confirmed their opinions." Similar commentary, devoid of corroboration, occurs routinely in traditional Islamic discourse. For example, the following remarks originate from the translator and commentator of the canonical Hadith collection, *Sahih Muslim*, though he did not possess a background in economics or finance:

> The latest researches in Economics have proved beyond any shadow of doubt that interest is responsible for the economic crisis in the world. With increase in the rate of interest, the margin of profit declines and the investor prefers to lend his money on interest rather than invest it in business and take risk. ... The ever-increasing growth of the interest-ridden economy is a conspiracy of the selfish and heartless moneyed class against other factors of production.[28]

Yes, interest had played a role in the crisis mentioned above, but once again a sweeping statement has been made here about those economies that allow interest without providing any corroborating evidence.

Although empirical studies by the proponents of Islamic banking and finance exist, there are two major problems regarding the attitude of the scholars concerned. Firstly, they tend to articulate their position in such an authoritative manner that hardly any room for an alternative position is left. They are guilty of failing to disclose that for most of the time the four sources – Qur'an, Hadith, Ijmaᶜ (consensus) and *Qiyas* (analogical reasoning) – are referred to only speculative or probabilistic knowledge results and thus any subsequent fatwa is nothing like a

Divine commandment; rather, these are no more than Qur'an and Sunnah-informed, human constructs. Lest there is any misunderstanding, as already noted earlier in this book that for Muslims the Qur'an is a source that yields certainty of knowledge, but that does not apply to human understanding and interpretation of it. Secondly, the same experts fail to acknowledge the existence of empirical studies that counter their claims.

For example, Syed Nawab Haider Naqvi is a leading Pakistani economist with a PhD from Princeton, former Director, Pakistan Institute of Development Economics, Islamabad (1979–1995), and author of *Ethics and Economics: An Islamic Synthesis*. His empirical research based on data from Pakistan and presented in the essay "Islamic Banking: An Evaluation" is illuminating:

> It has been widely noted by Muslim economists that the rationale (*'illat al-hukm*) of the prohibition of *riba* is not just the mathematical formula per se used to compute it; it is rather the alleged adverse consequences of it on the distribution of income and wealth. This is a correct position to take because, contrary to the Nozickian non-consequentialism (Nozick, 1974), Islam evaluates the correctness (or their opposite) of specific policies in terms of the acceptability of their consequences from the moral, economic, and social points of view. However, such an assertion is essentially a refutable hypothesis, which needs to be examined from the theoretical and empirical points of view.
>
> Here I examine this argument, using Pakistani data, ... The situation in other Muslim countries can be examined likewise. It should be clear that the information given in the table does not unambiguously verify the hypotheses noted above. Instead, it shows that *both the profit and interest incomes* – as well as all other types of incomes identified in the table – *accrue more to the rich than to the middle-income and lower-middle-income groups*; while the lowest of the low-income group gets nothing of interest and next-to-nothing of profits. The reason is that the initial distribution of income is highly unequal ... Thus those who have more already shall be given even more! The table even makes clear that, relatively speaking, *interest income is more important than profit income for the low-income and lower-middle-income groups* (in the Rs 1001 to Rs 4000 range) and the reverse is the case for the high-income group (in the Rs 4000 and above range). [29]

Even though these conclusions are based on the experience gained from just one country, the result of Naqvi's research contradicts the popular perception. If both profit and interest incomes accrue more to the rich, then focusing attention exclusively on interest is misplaced. Furthermore, if interest is more important to the lower income groups and profit (not interest) is more important to the high-income group, then the common claims made by the proponents of Islamic economics and finance requires much closer scrutiny.

The point is that because they are not familiar with the importance and role of empirical work, the religious jurists and scholars are prone to making uncorroborated claims, most often without specific empirical proof.

(b) Sayyid Abul Aʿla Mawdudi (1903–1979) was one of the most influential Muslim personalities of the 20th century and the founder of Jamaat-e-Islami, an Islamic political party based in Pakistan. He is considered one of the pioneers of the global Islamic revivalist movement. He was also hugely influential in the emergence of the Islamic finance and banking movement. The book that he wrote about *Sood* (interest), originally written in Urdu, made an ardent case for why it is prohibited in Islam. The excerpts below are from the Bengali translation of the book – there being no English translation of the work to date – *Sood o Adhunik Banking*. His position on meeting the non-profit, public needs of the government is as follows:

> The third category of debt relates to the public sector. Governments sometimes have to incur public debt, without any profit connection, to meet unexpected contingencies or during wartime. In modern economies, such needs are universally met through incurring public debt, and, of course, through interest-bearing instruments. However, in an Islamic system, the complete opposite would be possible. As soon as the government informs the public about its needs, the public and institutions would spontaneously, and instantly, donate from their wealth and income to the public treasury. In a system that is interest-free, and which also operates the *zakah* system, people would be economically so prosperous that they would be without worry and thus they would not hesitate to offer a portion of their surplus to the government. If the needs of the

> government are still not met, the government can seek a loan and the people would be voluntarily willing to offer a large interest-free loan. If the needs of the government are still not met, the government can take any of the following steps to effectively address its needs.
>
> a. The government will use the resources gathered from the *zakat* and *khums* (one-fifth of the booty collected from the enemy side during war).
>
> b. Through public decree, the government will mandate the removal of a percentage of the deposits held in the banks as a loan. Just as the government has the power and the right to impose the draft or conscription for military needs or to acquire homes, vehicles and other pertinent articles belonging to the people through requisition, it also has the power and authority to impose on the banks a requirement to extend loans to the government.
>
> c. The last resort would be to print currencies according to the needs of the government. This is tantamount to assuming debt on behalf of the public. However, it would be a means of last resort. If there is no other way to meet the needs of the government, only then should this option be used, because it predicates a large number of negative economic consequences.[30]

Mawdudi's suggestions do not reflect any study of economic history or economic experience of humanity; these views are sheer utopian. Contemporary Muslim scholars do not view *khums* or war-booty as a source of accumulation or acquisition of public wealth. Expecting the believers to open up their coffers anytime the government wants is unrealistic. And advocating zakah as a means to meet government needs, especially at this time when every Muslim polity has been anything but Islamic, is not reasonable or practical either. Requiring banks to offer interest-free loans to the government would be objected to and scoffed at even by the existing Islamic financial institutions and may lead to a run on their reserves as people attempt to remove their cash if, indeed, the policy is ever successfully implemented. As a last resort, printing currencies and notes as and when needed, and other things remaining the same, is a simple invitation to economic disaster

via rampant inflation the likes of which struck Germany during the interwar period. Even as a last resort, this should ***never*** be an option. It should be noted that Mawdudi was writing on these matters long before Islamic economics emerged as a substantive discipline. Thus, this is not a criticism of him in particular, but the general lack of awareness or neglect of the empirical foundation of many of our laws, ideas and prescriptions.

Discernible within these notions is the implicit rejection of *homo economicus,* Economic man, the rational and 'self-interested actor,' which is the prevalent assumption in modern economics. However, if Mawdudi's views are a reflection of *homo islamicus,* Islamic man, then there appears to be a serious problem with his hypothesis, because not only is there little supporting empirical evidence, but conversely, as indicated in the Qur'an, Islam itself does not reject the self-interest factor, which is the essence of *homo economicus*:

> Who receives guidance, receives it for his own benefit: who goes astray does so to his own loss... (*Surah al-Isra'*, 17:15)
>
> ... And whoever purifies himself does so for the benefit of his own soul... (*Surah Fatir*, 35:18)
>
> Whoever does good, it is for his own soul, and whoever does evil, it is against himself. (*Surah al-Jathiyah*, 45:15)

Thus, it is little wonder that one of the problems facing Islamic financial institutions involves *homo islamicus* imitating *homo economicus*.[31] This explains why *mudarabah* and *musharakah*, which are based on the principles of profit-loss and risk sharing, are claimed to be the modes of transaction that are Islamically most valid and acceptable, whereas the reality is that these are the least represented instruments in the portfolio of Islamic financial institutions, IFI's. It can be argued that IFIs are simply not adequately committed to Islam and thus are not taking those Islamically ideal, PLS modes seriously. However, the reality might be more complex.[32]

(c) Muhammad Taqi Usmani is regarded highly in the traditional Islamic establishment. He is a recognized expert in the fields of Islamic Jurisprudence, Hadith and *tasawwuf*. It is also claimed that he is an expert in economics.[33] He was the Judge at the Shari'ah Appellate Bench of the Supreme Court of Pakistan until recently. He is among the Shari'ah experts highly sought after by IFI's. He is also deputy chairman of the Jeddah based Islamic Fiqh Council, an organ of the Organization of Islamic Conference (OIC).

Usmani states he does not believe that there is any concept of time value of money in Islam:

> [I]n Shariah, there is no concept of time value of money.[34]

There are many Muslim economists who would flatly disagree with this point. Some argue that Islam does recognize the time value of money, but only when it represents transactions involving non-monetary assets. Thus, the time value of money in loans is not acceptable.[35] Others, such as El Gamal, who holds a chair in Islamic economics and finance, assert: "The notion that there is no time-value for wealth in Islam is false. The notion that money is sterile (does not grow by itself) and has no time value is – in fact – part of the traditional doctrine of the Catholic church, and rather alien to Islam."[36] Usmani also asserts that:

> [T]he instrument of interest has a constant tendency in favour of the rich and against the interests of the common people.[37]

As per so many religious scholars, Usmani is prone to stating his position in an authoritative manner without providing further evidence. However, as discussed earlier, Naqvi's empirical study based on actual data from Pakistan, is inconsistent with these bold assertions.

Indeed, not only are many jurists prone to writing in an uncorroborated manner about their own field, Islamic fiqh, but also about other areas (for example, economics) about which they have yet to demonstrate expertise. In the same book, under the chapter entitled "The basic difference between capitalist and Islamic economy," Taqi Usmani writes the following about capitalist economics:

> Interest, gambling, speculative transactions tend to concentrate wealth in the hands of a few.[38]

Although it is true that in developed countries wealth is concentrated in the hands of the few, the same effect is more pronounced in the developing world. In fact, interest, gambling and speculative transactions are not the real or primary factors leading to the concentration of wealth, unlike the claim in Usmani's sweeping statement.

Usmani further maintains that Islamic financing is most importantly characterized as asset-backed financing.[39] He further specifies that: "...every financing in an Islamic system *creates* real assets."[40] If instead he had written: "…every financing in an Islamic system *involves* real assets" Usmani's opinion may have been more defensible. However, even if his statement were indeed correct, then trade financing would cease to exist because these transactions might not lead to the creation of real assets. It is an unfortunate reality that existing IFI's are disproportionately involved in trade financing, rather than real sector financing to promote production and economic development.

According to Usmani, *musharakah* and *mudarabah* represent the only real Shari'ah financing instruments.[41] However, these two profit-loss sharing modes are rarely practiced by IFI's. Instead, cost-plus financing or *murabahah* (mostly debt-like instruments) continue to form the mainstay of Islamic banking. In the chapter, "The performance of the Islamic Banks – a realistic evaluation," Usmani makes a stunning revelation as he laments:

> This [i.e., Islamic] philosophy cannot be translated into reality unless the use of *musharakah* is expanded by the Islamic banks. It is true that there are practical problems in using the *musharakah* as a mode of financing, especially in the present atmosphere where the Islamic banks are working in isolation, and mostly without the support of their respective governments. The fact, however, remains that the Islamic banks should have advanced towards *musharakah* in gradual phases and should have increased the size of *musharakah* financing. Unfortunately, the Islamic banks have overlooked this basic requirement of Islamic banking and *there are no visible efforts to progress towards this transaction even in a gradual manner, even on a selective basis. … [T]he basic philosophy of Islamic banking seems to be totally neglected*.[42]

Usmani seems to believe that what is involved is merely a matter of expediency concerning the commitment of the people towards divine guidance. However, it appears that once again *homo islamicus* is displaying the behavior of *homo economicus*, which might be an indication that the behavioral assumption underlying *homo islamicus* is problematic.

Mohammad Hashim Kamali, a leading contemporary scholar of Islamic jurisprudence, comments that the overwhelming emphasis of IFI's on short-term financing primarily involving trade-financing rather than production-financing is contrary to the stated goals and premise of Islamic economics and finance:

> Short-term financing is largely concerned with the financing of goods already produced, and ***not*** *with the creation or increase of production capital or with facilities like factories and plants, infrastructure* etc. Yet it is investment in such facilities that encourages real economic growth. Hence the current emphasis of Islamic banks on short-term financing is not congruent either with the long term objective of the banks or with their social welfare agenda.[43]

Usmani reiterates the point when he writes:

> ... interest-based financing does not necessarily create real assets, therefore, the supply of money through the loans advanced by the financial institutions does not normally match with the real goods and services produced in the society, because the loans create artificial money through which the amount of money supply is increased, and sometimes multiplied without creating real assets in the same quantity. *This gap between the supply of money and production of real assets creates or fuels inflation*.[44]

Missing from the picture, which could simply be ascribed to poor articulation, is the lack of recognition that supply-side and demand-side shocks – shocks that result from production, technology, etc – are also responsible for causing inflation.

Once again, there is no acknowledgement that a need exists to test these propositions empirically. However, in practice this is precisely the approach that normal people take. Little wonder that despite the initial zealousness and commitment of the Iranian people towards the

ethos of the Islamic Revolution, the government quickly realized the expectation that the public would donate its money or offer interest-free loans in abundance to the State on demand was utterly unrealistic. Instead, the Islamic Republic of Iran legitimized the issuance of public bonds based on a fixed rate of return, rationalizing that this form of public borrowing is not covered by the prohibition on *riba*: "government borrowing on the basis of a fixed rate of return from the nationalized banking system would not amount to interest and would hence be permissible."[45]

This is not to suggest that the approach of Iran was valid or that there are no problems with interest; high interest rates, erratic interest rate fluctuations, variable rate transactions, credit-dependent lifestyles, and so on can have serious long-term economic implications. However, economists generally do not attribute these problems to interest itself. Whenever interest is *riba* (and exploitation or *zulm* is an unmistakable profile of *riba*), it must be rejected. However, a blanket approach leads to serious issues, such as the distinction between the nominal and real interest. Nominal interest includes a premium for inflation (added to real interest). If both nominal and real interest are regarded as prohibited, then Muslims must come up with an inflation-free economy, which no society has accomplished to date.

(II) SOME CONTEMPORARY THOUGHTS AND REFLECTIONS

Balancing a text-oriented approach with a life-oriented approach requires that we explore, understand and determine the social realities, processes and changes in a meaningful way. Muhammad Iqbal in this regard made one of the most relevant observations in his seminal work, *The Reconstruction of Religious Thought in Islam*:

> No doubt, the immediate purpose of the Qur'an in this reflective observation of Nature is to awaken in man the consciousness of that of which Nature is regarded a symbol. But the point to note is the general empirical attitude of the Qur'an which engendered in its followers a feeling of reverence for the actual and ultimately made them the founders of modern

> science. It was a great point to awaken the empirical spirit in an age which renounced the visible as of no value in men's search after God.[46]

Here, Iqbal is referring to the empirical attitude, particularly in the context of science. He also makes mention of "the general empirical attitude" even though he maintains that the definitive way of knowing about the higher truths is through divine revelation (i.e., what God wants to communicate to humans). In this respect, Iqbal has acknowledged the role of human efforts to know God through what He has made available as *ayat* (signs) in His creations and revelations. Notably, Iqbal's view possesses a mystic dimension to it:

> There is no doubt that the treatment of religious experience, as a source of Divine knowledge, is historically prior to the treatment of other regions of human experience for the same purpose. The Qur'an, recognizing that the empirical attitude is an indispensable stage in the spiritual life of humanity, attaches equal importance to all the regions of human experience as yielding knowledge of the Ultimate Reality which reveals its symbols both within and without.[47]

Although the empirical approach is particularly predominant in the physical sciences, Iqbal also points out the role and contribution of Muslims in the social sciences. In other words, the true scope of the empirical approach was not unknown or strange to Islam and the Muslims; Muslims having played a pioneering role in its development:

> Ibn Hazm, in his 'Scope of Logic,' emphasizes sense-perception as a source of knowledge; and Ibn Taymiyyah in his 'Refutation of Logic,' shows that induction is the only form of reliable argument. Thus arose the method of observation and experiment. It was not a merely theoretical affair. Al-Biruni's discovery of what we call reaction-time and Al-Kindi's discovery that sensation is proportionate to the stimulus, are instances of its application in psychology.[48]

In a timely and trailblazing book, *The Islamic Theory of International Relations: New Directions for Islamic Methodology and Thought*, Abu-Sulayman summarizes the problem associated with the lack of an empirical foundation:

From the very beginning of *usul*, we find Muslim jurists looking upon deduction from the Islamic texts as their main method in acquiring knowledge and in maintaining the social system according to the Shariah, both in internal and in external matters. They called it *usul istinbat al-fiqh* (the sources of deductive jurisprudence). In the physical sciences such as medicine, mathematics, and geography, however, Muslims drew on both, text and reason. They were empirical, experimental and applied both induction and deduction. Social sciences, such as political science, psychology, sociology, and social psychology, were absent basically because of the absence of empiricism and the lack of systematic induction and investigation of man and his social nature and reality. The notable exception was the eighth (fourteenth) century scholar, Ibn Khaldun (d. 1406 AD), who marks the real beginning of modern social sciences.

Two main reasons for this uneven classical Muslim growth are worth noting. The first was ... the general satisfaction with the existing social system laid down by the Prophet and strengthened by the religious texts. The second reason seems to be the failure of the ninth century Mu'tazilla movement to deal properly with the question of reason (*'aql*) and revelation (*wahy*) in an Islamic context. As a result, they could not establish a permanent basis for the evolution of a rational philosophy in Islam.

There was a general reaction in the ninth and tenth centuries against the alien Greek philosophy and the Islamically improper position of Mu'tazilla on the relation between reason and revelation. This reaction put an end to the Mu'tazilla experiment and simultaneously brought the demise of empiricism and systematic investigation in the field of Islamic social studies. *Tahafut al-Falasifah* (Refutation of the Philosophers) of Al-Ghazali (450–505 A.H.) in the fifth (twelfth) century is a landmark in the battle against rationalism.

This attitude is reflected in the Classical educational program, in which the text was emphasized and not much attention was paid to developing systematic rational knowledge pertaining to law and social structure. This attitude, which does not really conform to the Qur'anic attitude concerning *shahadah* (the humanly comprehensible), was easily accepted by those who were isolated from the passage of changing situation, or were conservative or interested in maintaining the status quo. The result was a lack of proper input and feedback into Muslim social studies and decision-

making process, and an absence of even the concept of organized social sciences. For these reasons *siyar*, continued to be a formalistic field of study rather than a dynamic Islamic empirical study of international relations.

It is not true that jurists, in approaching the Islamic text, proceed only by divine guidance; in the process they have to draw on their acquired understanding and knowledge. No one could really engage in such an activity with a blank mind. *Lack of rigorous application of empiricism through both deduction and induction and other methods of scientific research in the field of the social sciences is bound to result in grave errors and misunderstanding.* It is mainly under the influence of Western challenges, discoveries and scientific methodology that Muslims have hastily reinterpreted their texts in the face of these new realities. Nevertheless, they have failed to establish serious integrated studies and systematic research in the areas of law and social science. ... At present the Muslim system of education still lacks originality in this direction and is only a poor imitation of an alien educational system.[49]

Islamic countries need a new framework for Muslim social thought, one that is based on a systematic and objective investigation of the social aspects of human life. Only then is the achievement of a viable modern system of philosophical and moral, Islamic values possible. Together with fulfillment of this need, inductive and deductive methods must be rigorously applied to Muslim social studies. It is not surprising that ijtihad (original juristic opinions) ceased by the end of the fourth century A.H. (eleventh century A.C.) because the source material was the same, the method of deduction was the same, and no fresh input and feedback through new and continuous empirical investigations were available in the fields of jurisprudence and social studies. *Unless Islamic social sciences and humanities are genuinely established along with its textual bases through empiricism, and unless both induction and deduction are applied in these fields,* ijtihad must, for all practical purposes, continue to be considered closed and Muslim thought will lack dynamism and productivity.[50]

There is a growing recognition among Muslims about the importance of empirical works, especially in the arena of the social sciences:

One area of knowledge that has been deeply neglected by Muslims is the arena of social sciences. Except for the Islamization of Knowledge project

> and the *American Journal of Islamic Social Sciences*, both initiatives launched by American Muslims in [the] early 1980s, there has been very little attempt by Muslims to indigenize social sciences. Social sciences, unlike Islamic sciences, which are essentially normative paradigms, have an empirical focus. Social sciences are more interested in understanding *and describing the world as it is* rather than on *postulating on how it ought to be*. Without being prejudicial about what is more important, we must realize that while medieval Islamic sciences do provide a view of how the world ought to be a thousand years ago they do not equip our jurist-scholars with the training and tools necessary to understand the world as it is. *Ulema's* discourses on how the world ought to be become meaningless and therefore ineffective because they are not grounded in contemporary realities. Very simply, if you do not understand where you are, even if you know where you have to go, you will go nowhere.[51]

> It is important to appreciate that while an empirical approach and related research can be a vital complementary tool, there is also the potential for abuse and exaggerated claims.[52]

To complement Islamic jurisprudence Muslims urgently need to embrace empirical methods as argued here. Simultaneously, they also need to especially avoid falling into the trap of empiricism – the theory that holds that the origin of *all* knowledge is sense experience.[53] Since this position is inconsistent with the Islamic perspective, the relevant empirical foundation must instead be experientially connected to the real world and complement the recognized Islamic sources.

(III) UNDERSTANDING SUNNAT ALLAH (THE SUNNAH OF GOD) AND THE IMPORTANCE OF INDUCTIVE/ EMPIRICAL RESEARCH

A stumbling block for many Muslims in appreciating the relevance of the empirical approach is the narrow western notion of empiricism (relying on experience or observation alone). The conservative Islamic establishment is under the suspicion that empiricism will replace divine revelation, including the laws and injunctions specified therein. For example, in the case of the *hadd* punishments, whether

capital punishment is correct or otherwise is not a matter for debate; indeed there are certain situations in which capital punishment has been specifically mandated. However, since Islam also considers it of paramount importance that an innocent person must not be punished for a crime they have not committed, it is important to recognize that the application of *hudud* is a human not a divine process. In some countries, such as the USA, there are now an increasing number of cases of people who have been wrongly convicted for crimes which they have not committed and for which they have been either sentenced to life imprisonment or awaiting capital punishment on death row. DNA analysis and its application to forensic science has been an important contributory factor exposing these miscarriages of justice, allowing a number of convicts, either incarcerated or waiting on death row to be set free because of the conclusive scientific proof of their innocence. This type of situation helps illuminate the important role that the empirical approach can and should assume, simply because human beings need to exhaust all their efforts to ensure that justice prevails and the innocent are not wrongly convicted or punished. Muslims therefore need to study empirically how Islamic laws are applied. The terrible experience of the *hudud* law in Pakistan is a stark reminder of how Islamic laws, as formulated by fallible human beings, and applied by corrupt ones or those lacking human sensitivity, can lead to gross and unacceptable violations of Islam and the principle of justice.

The first step in solving any problem is to thoroughly grasp and understand its nature and extent. This requires inductive research and study. In this context, Muslims need to gain a sound understanding of not only the Sunnah of the Prophet, but also the *sunnat Allah*: God has put in place certain laws (*sunnat Allah*) guiding all natural as well as social processes that, according to the Qur'an, do not change:[54]

> (This was Our) way with the apostles We sent before thee: thou will find no change in Our ways. (*Surah al-Isra'*, 17:77)

Understanding *sunnat Allah* requires that the current text-oriented approach towards Islam be complemented by a life-oriented approach. The Inductive approach is essential in this regard. For example,

centuries of accumulated knowledge of economics now yield a number of economic principles or laws. This has been made possible through a combination of deductive and inductive methods. The field of economics, as for the other social sciences, advanced through the search for parallels to the natural laws made applicable to society. Accordingly, all proposed hypotheses have been subject to empirical study over a long period. Those hypotheses that have stood the test of time are now recognized and utilized as the laws of economics. Even so, the laws of economics are not perfect predictors of human behavior, yet, in spite of all their imperfections, these laws have been very useful in better addressing disparate economic problems. Of course, rarely are there solutions without side effects, and economic laws are no exception.

Similarly, the notion of *sunnat Allah* can act as a guide for Muslims to seek an understanding of the laws or processes underlying many of the problems or phenomena we encounter.

Fortunately, though long forgotten by Muslims themselves, this theoretical and empirical approach is not new to Islamic history. In some respects, Muslims have at least partially pioneered the field; the Muslim scholar Ibn Khaldun is recognized by the modern West as the father of sociology and the science of history. Unfortunately, Muslims gradually became more enamored by theology and law, and they virtually abandoned the legacy of Ibn Khaldun. In the estimation of Arnold Toynbee:

> ... in the Prolegomena *(Muqaddimat)* to his *Universal History* he has conceived and formulated a philosophy of history which is undoubtedly the greatest work of its kind that has ever yet been created by any mind in any time or place. ... the thought which had been set in motion in Ibn Khaldun's mind by his apprehension of the ruin which the Nomads had brought upon the Maghrib did not come to a standstill here. It moved on, with a gathering momentum, to contemplate the contrast between the Nomadic and the sedentary way of life and to analyze the nature of each; to ponder over the group-feeling or sense of social solidarity or *esprit de corps ('asabiyah)* which is the Nomad's psychological response to the challenge of life in the desert; to trace out a connexion of cause and effect between *esprit de corps* and empire-building and between empire-building

> and religious propaganda; and thence to broaden out until at last it embraced, in a panoramic vision, the rises and falls of empires and the geneses and growths and breakdowns and disintegrations of civilizations.[55]

The contribution of Ibn Khaldun amounts to exactly the kinds of relevant theoretical studies within the positive tradition to better understand *sunnat Allah*. Ibn Khaldun himself acknowledged how he was guided and inspired by Islam in this regard:

> When our discussion in the section on royal authority and dynasties has been studied and due critical attention given to it, it will be found to constitute an exhaustive, very clear, fully substantiated interpretation and detailed exposition of these sentences. *We became aware of these things with God's help* and without the instruction of Aristotle or the teaching of the Mobedhan.[56]

> *We*, on the other hand, *were inspired by God. He led us to a science whose truth we ruthlessly set forth*. If I have succeeded in presenting the problems of this science exhaustively and in showing how it differs in its various aspects and characteristics from all other crafts, *this is due to divine guidance*. If, on the other hand, I have omitted some point, or if the problems have got confused with something else, the task of correcting remains for the discerning critic, but the merit is mine since I cleared and marked the way. "*God guides with His light whom He will.*"[57]

Another notable Islamic scholar, and a contemporary of Ibn Khaldun who preceded him by just a few years, was al-Shatibi. He was also among the few who explicitly articulated the need for and emphasized the use of inductive methods to complement the deductive method employed throughout traditional Islamic discourse. Of course, al-Shatibi incorporated the inductive method into his own work:

> Abu Ishaq Al-Shatibi ..., in his book *Al-Muwafaqat fi-usul al-Shari'a* ('A synthesis of the principles of Shari'a') developed a philosophy of Shari'a focusing on the purpose of law. Contrary to the hitherto prevalent deductive method that used analogical reasoning, Shatibi employed an inductive

approach. He insisted that *the universal principles must be inferred by an inductive analysis of all the verses of the Qur'an*, rather than by deducing rules from selected verses. He concluded that the main objective of Shari'a was the protection of human interest (*maslaha*), articulated in the following five basic areas: person (self), reason, religion, family, and property.[58]

Unfortunately, incorporation of the inductive method, as part of the complete methodological toolkit of Islamic discourse, as well as the adoption of this approach towards ijtihad from the perspective of the philosophy of Shari'ah or *Maqasid al-Shari'ah*, remained neglected by the traditional Islamic scholars. Had al-Shatibi and Ibn Khaldun's legacy evolved to its logical conclusion and its potential properly explored in developing an understanding of *sunnat Allah*, then the trajectory of the history of Muslim society and humanity is likely to have been remarkably different.

It is no surprise that the subsequent emergence of Western civilization was the result of a broad adoption of the empirical approach and not the result of a purely text-oriented one unaware of the dynamic reality of existence. The practice of burying heads in sacred texts, such as the Bible, and limiting all consequent interaction to the level of deduction only, achieved little. As Western thought thrived the inductive method was continuously developed and then utilized, not only in the field of science but also in the social sciences from the perspective of natural laws. This was duly accomplished by adopting an empirical approach. Of course, historically, the European renaissance came about through a revolt against the text-oriented domination of the religious institutions, and thereafter religion was predictably and ultimately marginalized. Conversely, the inductive-empirical perspective of Ibn Khaldun and al-Shatibi occurred not through a revolt against the Islamic sacred texts, but to better understand the meaning, significance and relevance of the 'intent' (*maqasid*) of the Shari'ah.

Does the empirical aspect have any relevance for establishing what is Islamic law and what is not? So far in this book, we have identified three defining conditions for Islamic law: (a) that the formulation of the law be rooted in the foundational sources of Islam, (b) it is derived with explicit attention to the *maqasid* and values of Islam, and (c) that

the adoption and enactment of the law by society be through *shura*. In light of this chapter, those conditions need to be more nuanced, as follows: A law is to be considered Islamic when ***all*** three of the following conditions are met: (a) the formulation of the law is rooted in the foundational sources of Islam, with life-oriented, empirical due diligence, (b) it is derived with explicit attention to the *maqasid* and values of Islam, and (c) the adoption and enactment of the law by the society is through a process of *shura*.

(IV) CONCLUSION

In sum and to emphasize an empirical foundation is critically needed to render balance to Islamic law once again; by balance I mean that text-orientation be duly matched by life-orientation. At least six measures need to be addressed in this regard:

1. Many social problems require sensitivity at the human level. Those who formulate Islamic law – and the process of formulation needs to be re-examined as well – should be duly sensitized to human issues by requiring them to conduct research as well as project work to better and systematically understand the problems they are attempting to address.

2. The curricula of the religious institutions of higher learning must have research components that can help expose students and educators to understand the nature and extent of the problems concerning which they have to provide religious guidance. In this regard, education about the problem-solving approach and perspective has to be provided. Research components, paralleling modern educational methods, should be mandatory and include some empirical methodology. Each undergraduate student should be required to conduct a study involving a particular case and submit a project report as part of his or her degree. For example, a student could conduct interviews and surveys on a number of women analyzing i.e. the female experience with inheritance laws. A student could also monitor the daily life of a woman with

three or more young children for a week to note or share any directly relevant experience or lessons.

3. Prior to the formulation of any law, jurists and scholars should either make an effort on their own behalf, or draw on the expertise of relevant researchers to understand and learn about the problem at hand.

4. Since human fallibility must be taken into consideration, except in the case of those few issues that are explicitly legislated for in the Qur'an, all laws and codes must be treated as tentative in the first place due to the fact that human knowledge is only probabilistic.

5. After formulating or enacting all laws or codes, a study of the effects and consequences of the laws concerned must be required.

6. Women must be integrated into religious discourse at all levels, including at the level of ijtihad.[59]

Islam is formulated in accordance with human nature (*fitrah*): "Every person is born on the *fitrah*."[60] Thus, in the search to provide guidance and solutions for humanity it is important that Muslims possess a better knowledge of human nature. In the pursuit of understanding human nature, one cannot rely solely on deductive methods, which merely involve turning to a few texts. Life-oriented research and empirical work using an inductive methodology are also indispensable factors. It is envisaged that this approach will be helpful in ensuring that Islamic guidance becomes effective and dynamic again in our own time. It will also help to bridge the gap between the objectives (*maqasid)* of Islamic guidance and laws that are sometimes ineffective or, at other times, contrary to the stated intent.

CHAPTER 7

Conclusion: Toward Our Reformation

AS OF this moment, some strategic parts of the Muslim world are in the grip of violence and instability due to factors both internal and external in nature. For instance, the people of Darfur are facing a horrible conflict as part of an international power play involving oil, whilst in other strategic parts of the Muslim world, occupation or effective control by unfriendly forces persists. Illiteracy and poverty are particularly rampant in Muslim-majority countries, as well as being a prominent feature of many other areas of the underdeveloped world. Yet, in other parts, sectarian violence continues, the physical abuse of women, especially over dowry-related disputes, is common, and incidents involving the throwing of acid at women, by way of punishment for their supposed misdemeanors, continue to occur for which prosecutions are not common in either case. The 'honor killing' of women, though not exclusive to Muslims, continues across Muslim regions, in the mistaken assumption by those involved that this is their right to effect so draconian a sentence. In the heartland of Islam, where the holiest place of Islam was founded by a lone woman, the female half of the population is not allowed to drive, this being stipulated in the name of Islam.[1] Even in 'progressive' Muslim-majority countries, a Muslim spouse can be served a triple *talaq* (irreversible divorce) message through SMS on a cell phone,[2] and a woman, who converts from Islam to Christianity, cannot change her name because "traditional Islamic law does not admit the reciprocity of rights regarding changing one's faith."[3] In the West, there are many mosques where Muslim women

are not welcome and their participation is not facilitated by male-dominated decision-makers that constitute the mosque committees. On a still more profound scale, a major, oil-rich, Muslim-majority country has been invaded, occupied, and ruined on the basis of lies, deception and suspicions, while the Muslim world appears powerless to do anything about the dire situation.

On the one hand, many of these issues are matters, which concern the prevailing socio-cultural-political environment. However, it is also true that the Muslim mind and the present culture are entrapped in the current dysfunctional and stagnant situation, and hence these are unable to effectively respond to the challenges because of the deeply conditioned traditional religious understanding and devotion that exists. Many Muslim men feel that a woman's participation might not be conducive to maintaining a purely religious environment, but are otherwise sincere in their belief, so much so that they confidently refer to the famous statement of ʿA'ishah in *Sahih al-Bukhari* which states that had the Prophet known what the women were doing in the mosque he would not have allowed their participation.[4] As detailed in Chapter Three, even though this report does not constitute a hadith, and there is absolutely no corroboration of Ayesha's assertion in the matter in any case, almost all exclusively male derived traditional *fiqh* has left the indelible impression on the common Muslim man that preventing or dissuading women from participation in the mosque is part of doing God's work.

Many Muslims become animated about, and even violent over, claims of apostasy relating to someone from among their fold because of a traditional view of Islamic law upheld by some scholars[5] not all of whom are considered traditionalists, that continues to exert a powerful hold over the perceptions and emotions of the common believer. This is so because they have been conditioned to think that Islam requires capital or some form of punishment for apostasy and that there is a "consensus," or Ijmaʿ, on the matter. The reality is that such views amount to maintaining that Islam does not affirm the fundamental human freedom to choose and change one's faith at will, and that force is necessary to keep apostates within the Islamic

fold. Furthermore, this acts as a negation of the principle of reciprocity whereby adherents of other religions are invited to renounce their faith and welcomed to enter into Islam without being punished or persecuted by their former co-religionists in the process. The kind of a *daʿwah* (invitation) that the Muslims wish to propagate to the rest of the world about Islam needs to be re-examined in this context.

While Muslims, including the traditionalists, keep repeating the mantra that Islam treats women with justice and dignity, it appears that even Muslim women do not agree with this pious rhetoric. As they become more and more educated they also become socially capable of broader participation. More importantly, for such a long period of time the sacred texts of Islam were read and interpreted for women almost exclusively by male scholars, jurists and imams, and implemented by male *qadis*, *fuqaha'* and other decision-makers. Increasingly, Muslim women are relearning their own history. They have gathered that throughout Islamic history, as for most other areas of learning and participation, women were marginalized. However, particularly in the field of Hadith, they were co-contributors in a highly significant way to its preservation and dissemination.[6] It is so unfortunate that later even the Hadith itself has been abused to effectively marginalize women in society.

Women are learning about the vital and vibrant role they played from the very beginning of the Prophethood of Muhammad, as they struggled and fought alongside the male Muslims for the establishment of an Islamic society in Madinah; realizing the Islamic vision and values in the path of God and service of humanity. The Qur'an unequivocally acknowledges this half of the community not in a marginal sense, but side-by-side, the equal of, their fellow male believers:

> Never will I suffer to be lost the works of any of you, be he **male or female**: You are members, one of another: Those who have left their homes, or been driven out therefrom, or suffered harm in My Cause, or fought or been slain, – verily, I will blot out from them their iniquities, and admit them into Gardens with rivers flowing beneath; – A

> reward from the presence of Allah, and from His presence is the best of rewards. (*Surah Al ʿImran,* 3:195)

With their education and experience, women are directly connecting to the Qur'an and the legacy of the Prophet, and, in doing so, discovering that there is nothing in these sources that should have allowed others among the Muslims to marginalize them in society and subject them to discrimination or degradation.

Meanwhile, in the field of Islamic banking and finance, there exists the status of Shariah-compliance and the Shariah scholars have provided the relevant stamp of approval where sanctioned. However, Muslims have a legitimate reason to inquire as to why these financial vehicles are not termed Islam-compliant or Shariah-based, instead of merely Shariah-compliant. According to contemporary fatwas, for example, investing in mutual funds or companies with up to thirty-percent income or return derived from interest-bearing assets constitutes Shariah-compliance. This is, as El Gamal aptly describes, the triumph of "form-above-substance."[7] Moreover, delinked from the *maqasid* (higher objectives) of Islam, with regards to the economic and financial aspects of life, Islamic banking and finance is growing at an explosive rate, but without effecting even a minimal impact on the real economic challenges of human society such as poverty, deprivation, income inequalities, etc.

Still more so, in the name of Islam, is the specter of jihad being proclaimed by a section of the community and waged against almost everyone, irrespective of whether they can be construed as genuine adversaries of Islam or whether they are innocent people of the West, as per September 11, 2001, or whether they are innocent fellow Muslims, as per Iraq. Indeed, Muslims do have many grave and genuine grievances, and it is true that these must be urgently addressed, but nowhere in the Qur'an or in the legacy of the Prophet is there any justification whatsoever for targeting innocent victims, Muslim or non-Muslim alike.

The problem is already bad enough because of the irresponsible and chaotic violence perpetrated by a small element of extremists among the Muslims. Yet, the selective approach of some prominent,

otherwise respectable and responsible scholars, towards this trend has not been adequately helpful.[8] While Muslims condemn the extremist violence of these fringe groups, an unfortunate reality is that there exist Muslims, otherwise mainstream and traditional, who have a theoretical construct that lends credence to the violence, even though the construct itself is not consistent with a value-oriented perspective.

Unfortunately, the creed of violence is assuming a new hold even over some of the institutions of higher learning in some leading Muslim-majority countries that claim to be governed by Shari'ah. A doctoral dissertation supervised by a prominent Muslim academic and intellectual is illustrative in this regard:

> To illustrate, 'Ali b. Nafi' al-'Ulayni wrote a doctoral thesis on *Jihad* at the Umm al-Qura University … in 1984, under the supervision of Professor Muhammad Qutb … Al-'Ulayni defines *Jihad* as 'killing infidels for the supremacy of the word of God and to support this objective.' The word [*Jihad*] simply means killing infidels for the supremacy of the word and cannot be interpreted otherwise unless there is an evidence for a different meaning.[9]

Is this merely a solitary item and thus an aberration? It would have been more comforting if it had been but an isolated case. However, this does not appear to be so:

> Al-'Ulayni is not alone. He mentions several M.A. and Ph.D. dissertations in the universities [in several Arab countries] written during the same period offering similar arguments about *Jihad*. He also refers to a number of scholarly works that condemn the *bid'ah* of defining *jihad* as defensive.[10]

Does this constitute a contemporary malady? Unfortunately, it would seem not. The view of al-Shafi'i was mentioned earlier in this book where he articulated the opinion that Muslim rulers should attack the *mushrikun* at least once a year.[11] More importantly, everywhere al-Shafi'i has mentioned jihad in his book *al-Risalah*, contrary to the broader meaning of the term as enunciated in the Qur'an and

Hadith, the term has been employed in the sense of war and fighting exclusively. Although al-Shafiʿi is not the final authority on Islam, because he is the acknowledged father of *usul al-fiqh* and the founder of one of the main schools of jurisprudence his views have enormous influence on these matters from a legalistic perspective. It is true that the Qur'an contains specific words for war and battle, such as *qital* or *harb*, and though the Hadith collections also mention jihad, the broader meaning of which was affirmed during the Prophet's life, there occurred a gradual erroneous and unacceptable shift away from the wider definition of the term in legalistic discourse towards the narrowest meaning of fighting and war.

That these issues were inappropriately projected back to textual sources in general and Hadiths in particular for support and evidence is explained and articulated in this book. Keeping the examples above in mind, the most important aspects of what this book is trying to convey and accomplish requires summarizing.

Firstly, Shariʿah, as it is commonly used, is a misleading term as so many extraneous attributes like divinity, sacredness and immutability are assigned to it. When, in a reductionist manner, the Shariʿah is equated with Islamic law society suffers from legalism. Detachment from the spirit, goals (*maqasid*), or normative principles of Islam not only involves loss of social dynamism, but also overwhelmingly burdens the lives of the masses with troublesome literalist and absolutist interpretation. While most Islamic law in its *detail* is based on fallible human interpretation, these laws are formulated, presented, and enforced with a veneer of divine sanction or showcased as "sacred law" even though true divinity, infallibility, and sanctity from an Islamic perspective can only be attributed to the Qur'an, and even in this case restricted to the revealed Qur'an alone. Understanding and interpretation of the Qur'an according to the limitations imposed due to the agency of human beings, is definitely not absolute nor divine, a fact that the interpreters, scholars, jurists and educators must acknowledge and disclose, and of which the Muslim believer must be aware:

> There is no end to the vanity of man. In the name of infallibility of God, Holy Qur'an and Sunna, he claims infallibility for himself.[12]

Once beyond this misunderstanding, Muslims will be free from attributing divinity to what is not and can begin to turn to divine guidance and whatever is derived thereof, instituting it in a more dynamic manner for personal guidance as well as for problem-solving in this world.

Secondly, the Qur'an is the culmination of all the divinely revealed texts throughout human history. It occupies a central and unrivalled position in Islam. The Prophet himself could not contradict it. Thus, nothing else negating the Qur'an can be used and adduced in support of a doctrine, law or code – a crucial point that is generally acknowledged by all Muslims. However, in reality, the practice of elevating other sources to a higher level than warranted, when, for example, where Hadith have been found to be at variance with the Qur'an, has led to accommodation, validation or upholding the Hadith by invoking various notions or theories, such as *naskh* (abrogation), and adjusting the Qur'anic interpretation. In certain cases, the existence of Hadith has not been necessary to override the guidance of the prime source; a clear example being the explicit Qur'anic requirement for witnesses in a divorce case. (*Surah al-Talaq*, 65:2) This has not, however, deterred some *madhhabs* from dispensing with the requirement to produce such witnesses, causing women to suffer gross injustice in the process. To avoid these problems, all ***essential*** principles, doctrines and values, as well as any concomitant law – particularly harsh law – that affects the life, property and honor of people must be derived directly from the Qur'an *and* without contradicting it.

Thirdly, the Prophetic legacy, or Sunnah, is also vital to Muslims and the Islamic way of life. The Prophet is identified in the Qur'an as the exemplary model (*uswatun hasanah*),[13] and Muslims are supposed to follow the Prophet Muhammad in the way demonstrated by him when worshipping our benevolent *Rabb* (Creator, Sustainer and Evolver); this involves abiding by the details presented to the community, including all doctrinal clarifications, behavioral norms, and elucidations of the values and commandments contained in the Qur'an. The Prophet also constitutes the final messenger sent by God to give the entire human race the good news about salvation,

the peace of the eternal life, happiness and abundance, forgiveness due to man's intransigence, insolence and arrogance, alongside the warning of impending damnation and deprivation of God's mercy. Since the Prophetic model is precious to the Muslims, the Hadith literature remains critical to a better knowledge and understanding of this ideal. Thus, any propensity to reject the Hadith in general – discernible in some quarters – is simply a matter of egregious error.

However, as demonstrated in Chapter Three, the traditional view of the Hadith also indefensibly exaggerates the source, in terms of placing it on a par with the Qur'an, when some measure of divinity is claimed in this regard. As the Qur'an rarely provides the pertinent details, Muslims by default turn to the Hadith for clarification and illumination. However, the problem with ascertaining knowledge concerning the Hadith is so enormous that derivation of harsh or categorical laws and codes, within a divine framework, has to be treated with a great deal of circumspection. Except for a handful of *ahadith* (considered to constitute less than a dozen) that are *mutawatir*, almost all Hadiths are *ahad* (solitary). The latter category, including the *sahih*, does not yield certainty of knowledge and therefore cannot be dogmatically claimed to be the binding and enforceable basis for laws and codes, especially when some narrations contradict the fundamental values and norms established in the Qur'an. Due to the lack of certainty of knowledge because of their solitary nature, laws should not be formulated only because there is something in the Hadith literature. Rather, while scholars, jurists and experts devote themselves to the best of their ability to authenticate and analyze the pertinent Hadith and are duly consulted throughout, the formulation of law should occur according to a *shura*-based, representative process.

Fourthly, as discussed in Chapter Four, the commonly held views about Ijma^{c} (consensus) are untenable and exaggerated. Not only does no Ijma^{c} exist about the definition of the term itself, but also there is hardly any aspect of Ijma^{c} about which any consensus arises. While Ijma^{c} has served an integrative role to crystallize views in the framework of the *madhhabs*, it has become too widely an abused tool overall. More importantly, as the classical definition of Ijma^{c} is no

longer tenable and as it has been gradually transformed into a dysfunctional method invoked as a means of last resort, Muslims need to revisit and reframe the concept on the basis of a *shura*-based, representative process. All groups – and nations are considered groups here too – need agreements to be as widely ranging as possible, including consensus. However, there is no Islamic basis, as demonstrated in the pertinent chapter, for claiming the divinity or infallibility of Ijmaᶜ and therefore this source of Islamic jurisprudence needs to be rescued from the ongoing facade perpetuated about it. Claiming that there is an Ijmaᶜ on something, as is frequently done, needs to be challenged in the name of Islam. Instead of assuming that an Ijmaᶜ exists on so wide a variety of matters Muslims need to recast Islamic law, wherever appropriate and relevant, according to a non-elitist, broadly participatory, *shura*-based process.

Furthermore, many legal verdicts, for which an Ijmaᶜ is advanced, reflect a unique socio-historical context going all the way back to the time of the Prophet and his Companions. However, the particulars or details of any aspect of law may not be universally applicable throughout time. For example, the specifics of the inheritance law of Islam, which is regarded as one of its highest achievements, are based on a tribal society and environment where the claims of the extended families of the tribe are perfectly sensible. However, in a non-tribal environment, where a single nuclear family is the norm, traditional inheritance law may not only be dysfunctional, but also counter-productive; this is demonstrable through real life experience as well as empirical works. Merely stating that a consensus extends towards certain aspects of Islamic law is insufficient reason in light of the practical challenges facing society; challenges that can be better addressed by resurrecting and reinstituting both the values and the higher objectives (*maqasid*) of the Qur'an and the Prophetic legacy.

Fifthly, that *Qiyas*, or analogical deduction, is a valid and useful methodological tool is uncontested. However, as Chapter Five discusses, *Qiyas* has become yet another seriously abused tool of Islamic jurisprudence. As exemplified in the One-Half rule applicable to slaves, *Qiyas* has been used to provide long-term accommodation

to the un-Islamic institution of slavery, instead of pursuing Islam's original intent to abolish the practice. Slavery is an indisputable violation of the fundamental right to human dignity and Islam stands for its abolition rather than making an accommodation with it or its simple amelioration. Similarly, *Qiyas* has been used in the case of marriage and divorce in ways that have degraded women to the level of a commodity in a business transaction. Worse, such legal practice and interpretations are systematically presented, upheld, or defended as Islamic, with the implication that these are based on divine laws or guidance and that Muslims must surrender before them faithfully and uncritically. The reality occupies a position farthest from these claims and views.

Analogical deduction is a universally recognized tool for expanding human knowledge and its application involves moving from what is known to what is unknown but similar. However, any law that is derived in this manner must not be claimed to be divine, thereby requiring Muslims to treat it as sacrosanct. Once again, scholars, jurists and experts are justifiably permitted to apply all the pertinent intellectual tools to expand the human knowledge base, but then, when it comes to the formulation of law, this must be achieved through a *shura*-based, representative framework.

Sixthly, the received corpus of Islamic law does not possess an empirical foundation and the vital role of research, concerning the pertinent matters required to understand and analyze a problem both before and after the formulation and enactment of a law, is currently absent. The Hudood Ordinance of Pakistan demonstrates how, in the name of Islamic law (thoroughly steeped in legalism and paternalism), perversion can and does occur causing terrible suffering for Muslims, particularly women from poor, disadvantaged groups. To amend this situation, the curricula of the institutions of higher religious learning need to incorporate systematic research into their programs and the study of the problems together with their solutions must be placed on an empirical footing, drawing upon real-life experience. Instead of its text-orientation, Islamic jurisprudence and law needs to become life-oriented. Lacking any systematic empirical foundation, our noble scholars and jurisconsults have devised legal

loopholes or juristic escapes through the introduction of tools like *istihsan*, *maslahah*, *darurah*, etc. Recourse to these methods indicates their sensitivity to human issues and an attempt to address them in the context of an Islamic framework. However, devoid of a systematic empirical foundation these stopgap measures have become merely an *ad hoc* fix whereby different scholars contrive their own solutions without any semblance of coherence or long-term relevance. Islam is both a *huda* (guidance) and a *shifa'* (healing/solution) for our problems and challenges, including the maladies of life. In the final analysis, Muslims can better practice Islam, serving their co-religionists and humanity, as intended by the Qur'an and the Prophetic legacy, if the veneer of divinity and the sacredness of most of what is known as Islamic law is simply removed and discarded.

As the book explains, a law should only be regarded Islamic when ***all*** three of the following conditions are met:

(a) The formulation of law must be rooted in the foundational sources of Islam, according to a life-oriented, empirical approach where due diligence is rigorously practiced;

(b) it is derived with explicit attention to the *maqasid* and values of Islam; and

(c) the adoption and enactment of law by the society through a process of *shura*.

If the Muslim Ummah is to meet challenges contemporary to each generation then Muslims need to reconnect themselves to Islam by repositioning the Qur'an at the ***center*** of their understanding and commitment. The Qur'an provides relatively few legal precepts. However, manifest within its message is a value-oriented approach from which a set of values can be extracted that is universal in nature. Some examples of the values alluded to were discussed in Chapter Two. Such value-orientation would enable better praxis in terms of the higher objective – *maqasid* – of Islam. In this context, the term *maqasid al-Islam*, instead of *Maqasid al-Shari*ᶜ*ah*, should be used. The dynamism engendered in this radical alternative would

free Muslims from the insularity of their current text-orientation, which is a significant factor responsible for their stagnation.

Instead of denying, neglecting or repudiating Hadith, Muslims must cherish and turn to this source of literature to better understand what constitutes the universal or essential aspect of the Sunnah of the Prophet; mindful not to subvert the context in the process. However, the process of adopting this dynamic perspective must not entail elevating the Hadith to an unwarranted level in terms of its divinity or infallibility. This problem-solving approach does not entail the redundancy of other methods either. Rather, it will require Muslims, imbued with, and guided by, the values of Islam, to apply the full range of their God-given abilities to seek guidance, solve their own problems, set examples for, and serve humanity as the Qur'an proclaims:

> You are the best of peoples, evolved for mankind, commanding what is right, forbidding what is wrong, and believing in Allah. (*Surah Al ʿImran*, 3:110)

> Let there arise out of you a band of people inviting to all that is good, commanding what is right, and forbidding what is wrong: They are the ones to attain felicity. (*Surah Al ʿImran*, 3:104)

> Thus, have We made of you an Ummah justly balanced, that you might be witnesses over the nations, and the Messenger a witness over yourselves …(*Surah al-Baqarah*, 2:143)

As those who have been "evolved for mankind," to serve humanity, or to act as witnesses over the peoples of the world and as a justly balanced community (*ummatan wasata*), Muslims need to think outside the configuration of the current box of Islamic jurisprudence. The present mode of fossilized thinking and sunken attitudes, as reflected in the passage below, is incompatible with the dynamism of Islam:

> Muslim Personal Law need not be changed, as the wise Judiciary can reinterpret it in the changed circumstances and do full justice to women

> and show benevolence to them on the basis of Qiyas, which is also the mission of Islamic Law. That is why the talk of altering the Muslim Personal Law in India and other countries is spurious.[14]

The impetus for the formation of a separate Personal Law Board by the Muslim women of India can be understood in the context of the utter lack of recognition and acknowledgment of the problem according to traditional Islamic jurisprudence.

Toward effecting this desired reformation (*Islah*) Muslims need to institute fresh thinking about Islamic law and Islamic jurisprudence in light of the Qur'an and the Prophetic legacy tempered by real life experience. The value-oriented approach, concomitant with reconstituted Islamic law and jurisprudence, when combined with a real life empirical foundation, can, God willing, pave the way for Muslims to live in this world, individually and collectively, and lead the world by example, while seeking their salvation through serving humanity along the path intended and devised by God.

Seeking constructive transformation is a dynamic and exciting challenge. In pursuit of success both in this life and in the life hereafter Islam invites everyone to constantly seek positive change – change that helps improve individuals at all levels, while positively touching the lives of others. Of course, change begins at home; with us in the first instance. Those who appreciate and seek such change in a proactive manner – not reactionary (as happens now) – will not only change themselves, but also, in the process, effect changes in others:

> Allah does not change the condition of a people until they change their own condition. (*Surah al-Raʿad*, 13:11)

May the mercy and love (*rahmah*) that are the overriding essence of God[15] and the exemplary life and legacy of Prophet Muhammad, the *Uswatun Hasanah*, who was sent as a mercy to humanity and the worlds,[16] illuminate the beliefs and thoughts of the believers and radiate through their lives, transforming their own lives and societies, and in the process bring betterment (*Islah*)[17] to the world.

NOTES

FOREWORD BY M.N. SIDDIQI

1 Ansari, M. T., (trans., with introduction and notes), *Sunan Ibn-e-Majah* (New Delhi, India: Kitab Bhavan, 2000), hadith no. 4008. The translation is by the author of the Foreword.

2 Al-Shatibi, Abu Ishaq, *Al-Muwafaqat fi Usul al-Shari'ah* (Cairo, Egypt: al-Maktabah al-Tawfiqiyyah, 2003), vol. 3, pp.162–63. The translation of the excerpt is by M. N. Siddiqi.

PREFACE BY TAHA J. ALALWANI

1 *Al-Jami' al-Sahih Sunan al-Tirmidhi*, the section entitled, "No Muslim shall be put to death on suspicion of being an unbeliever," no. 1214.

2 See *Al-Risalah* (Cairo: Dar al-Nafa'is, 1979).

3 Al-Sha'bi reported that Fatimah bint Qays had said, "My husband divorced me irrevocably, and I wanted to receive alimony. Hence, I went to the Prophet, who said to me that I was neither entitled to receive alimony nor accommodation." When this was reported to 'Umar he said, "We should not ignore the Book of God or the Sunnah because of a report by a woman who may have forgotten the exact words." (He then quoted the passage of the Qur'an which reads, "Do not expel [divorced women] from their homes…" [*Surah al-Talaq*, 65:1].) 'Umar's practice made it compulsory for a husband to provide alimony and accommodation.

4 Sunan Abu Dawud, *Kitab al-Diyyat*, the section on an "Imam ordering forgiveness for a killing," hadith number 1503.

5 This hadith is neither accepted nor rejected because it contradicts the explicit meaning of the Qur'an and the Sunnah.

CHAPTER 1

1 Ansari, M. T., (trans.), *Sunan Ibn-e-Majah* (2000), hadith no. 224.

2 Farooq, M. O., "Mind Building: A Neglected Dimension of Islam," *Message International* (June 2000), pp.35–36, 42; AbuSulayman, A., *Crisis in the Muslim Mind* (Herndon, Virginia: International Institute of Islamic Thought, 1993); Hathout, H., *Reading the Muslim Mind* (Indianapolis, Indiana: American Trust Publication, 1995).

3 Khan, M. M., (trans.), *Sahih al-Bukhari* (Madinah, Saudi Arabia: Madinah University, undated), vol. 6, hadith no. 61.

4 AbuSulayman, *Crisis in the Muslim Mind*, 1993, p.ix.

5 Mumisa, M., *Islamic Law: Theory & Interpretation* (Beltsville, Maryland: Amana Publications, 2002), p.44.

6 Siddiqi, A. H., (trans., with introduction and notes), *Sahih Muslim*, vols. i–iv (Lahore, Pakistan: Sh. Muhammad Ashraf, 1982), vol. iv, hadith no. 6448. Also, see Khan, M. M., (trans.), *Sahih al-Bukhari*, vol. 4, hadith no. 662; vol. 9, hadith no. 422.

7 This observation, about unquestioning conformity, relates only to ritual worship (*taᶜabbud*), not to dealings involving social matters (*muᶜamalat*). Once a person professes to be a Muslim, questioning why one has to pray five times a day rather than four or six times, or why one prostrates after bowing and not before, or why the dawn prayer involves two obligatory units while the afternoon prayer consists of four, etc., is redundant because God has not given specific rationales for all these details and no human being can provide any definitive reason in God's name. Regarding ascertaining t he divine wisdom or rationale behind ritual worship and social dealings, al-Shatibi enunciated:

"'Wise purposes' which are derived to explain things whose meaning cannot be comprehended, particularly those pertaining to required acts of worship – such as the requirement that ritual ablutions include the washing of certain parts of the body and not others, the requirement that ritual prayer be performed in a certain manner, including the lifting of the hands, standing, bowing, prostrating, etc., and not in some other way, the requirement that Muslims fast during the day rather than at night, that ritual prayers be performed at certain times of the day and night and not others, that the pilgrimage to Makkah involves the performance of specific actions and not others, that such acts be performed at certain locations and not others, and that the pilgrimage be concluded in a particular mosque, etc. There are, in addition, other acts of worship the basis for which cannot be readily understood and which would not even suggest themselves to one's mind. Yet in spite of this, there are people who attribute to them wise purposes which they claim to be the basis for the Lawgiver's having established these practices. All such claims, however, rest on surmise and conjecture which have nothing to do with the subject at hand and upon which no action whatsoever is based. ..." (Al-Raysuni, A., *Imam al-Shatibi's Theory of the Higher Objectives and Intents of Islamic Law* (Herndon, Virginia: The International Institute of Islamic Thought, 2005), pp.173–174, citing al-Shatibi, *al-Muwafaqat*, I:80. The matters pertaining to social dealings are different because these must be understood and approached from the perspective of higher objectives, *maqasid*, and any guidance in this regard must conform to or facilitate the achievement of those pertinent higher objectives.

8 Kamali, M. H., *Principles of Islamic Jurisprudence*, 3rd edn. (Cambridge, UK: Islamic Texts Society, 2003).

9 Laldin, M. A., *Introduction to Shariah and Islamic Jurisprudence* (Kuala Lumpur, Malaysia: Cert Publications Sdn Bhd, 2006).

10 Guraya, M. Y., *Islamic Jurisprudence in the Modern World* (Lahore, Pakistan: Sh. Muhammad Ashraf, 1993).
11 Qadri, A. A., *Islamic Jurisprudence in the Modern World* (Bombay, India: N. M. Tripathi Publishers, 1963).
12 Nyazee, I. A. K., *Islamic Jurisprudence (Usul al-Fiqh)* (Islamabad, Pakistan: Islamic Research Institute, 2000).
13 Mumisa, 2002.
14 AbuSulayman, 1993, p.xvi.
15 Siddiqi, M. N., "Relevance and Need for Understanding the Essence of Religious Traditions in the Contemporary World." Paper presented at the International Seminar on Inter-Civilizational Dialogue in a Globalizing World, Institute of Objective Studies, New Delhi, April 8–10, 2005, http://www.siddiqi.com/mns/Relevance_April2005_Delhi.htm. [Accessed on May 8, 2006].
16 AbuSulayman, 1993, pp.25–26. The reference to a triple *talaq* in the case of Imam Malik has an interesting historical background. Under the Abbasid dynasty "subjects were required to take an oath of allegiance in which they swore that if they ever broke their allegiance to the *khilafah* then their wives would stand divorced. Thus, Malik's fatwa absolving one under duress of the consequences of pronouncing divorce was, under the circumstances, an important political statement." (Ibid., pp.25–26; format for dates has been edited for consistency.)
17 Hasan, A., (trans., with introduction and notes), *Sunan Abu Dawud*, vols. i-iii (New Delhi, India: Kitab Bhavan, 1990), vol. iii, no. 4900.

CHAPTER 2

1 Theodore Lothrop Stoddard (1883–1950) was a Harvard educated historian. He had a racist angle to his thoughts and was openly anti-immigration. For more, see http://en.wikipedia.org/wiki/Lothrop_Stoddard. [Accessed May 21, 2007].
2 Stoddard, Theodore Lothrop, *The New World of Islam* (New York, USA: Charles Scribner's Sons, 1921), p.3.
3 Suhayb was a blond Arab boy raised as a slave in Rome under the Byzantine empire; upon embracing Islam, he became known as Suhayb al-Rumi.
4 Ansari, Moin, "They Came Before Columbus – The Muslims: Rebuilding The Jewish Christian Muslim Symbiosis in America," *Rupee News*, December 12, 2007. Retrieved on August 15, 2009 from Rupeenews.com website: http://rupeenews.com/?p=236, citing Jacob Bender, President of *Reason and Revelation*, author of "Three Wise Men," and a filmmaker.
5 In keeping with the pluralistic norm and heritage of Islam, as exemplified by the Charter of Madinah formulated under the guidance of the Prophet, instead of identifying a state as a "Muslim country" the term "Muslim-majority country" is preferred.
6 Ramadan, T., *Western Muslims and the Future of Islam* (Oxford, UK: Oxford University Press, 2004), p.31.
7 Ayoob, M., "Muslims Could Benefit from Banishing the Word 'Jihad'," *Daily Times* (October 1, 2006).
8 Ramadan, 2004, p.31.

9 For pertinent information and analysis of this unislamic and inhuman experience, see Farooq, M. O., "Rape and Hudood Ordinance: Perversions of Justice in the Name of Islam," (2006), http://www.islamicity.com/articles/Articles.asp?ref=IC0612–3179. [Accessed on June 21, 2007]; Quraishi, A., "Her Honor: An Islamic Critique of the Rape Laws of Pakistan from a Woman-Sensitive Perspective," *Michigan Journal of International Law* (18) (1997), pp.287–320; Jahangir, A. and H. Jilani, *The Hudood Ordinance* (Lahore, Pakistan: Rhotus Books, 1990).

10 Ramadan, 2004, p.31.

11 Masud, M. K.,"Muslim Jurists' Quests for the Normative Basis of Shariah." Inaugural lecture at the International Institute for the Study of Islam in the Modern World, Netherlands, 2001, http://www.isim.nl/files/inaugural_masud.pdf. [Accessed on August 29, 2007], p.5.

12 Asad, M., *This Law of Ours and Other Essays* (Gibraltar: Dar Al-Andalus, 1987), p.28.

13 Esposito. J., *Islam: The Straight Path* (New York & Oxford: Oxford University Press, 2005), pp.74–75.

14 Ibid., p.78.

15 Khurram Murad, *Shariah – The Way to God*, excerpts, undated, http://www.youngmuslims.ca/online_library/books/shariah_the_way_to_god/p2.htm. [Accessed September 2, 2006]. The author was one of the major figures of Jamaat-e-Islami, Pakistan, who also lived in the West for a considerable length of time and dedicated his life to better present Islam to Muslims in the West.

16 http://web.youngmuslims.ca/online_library/books/shariah_the_way_to_god/p4.htm.

17 http://web.youngmuslims.ca/online_library/books/shariah_the_way_to_god/p3.htm.

18 Rabbani, Faraz, "Shariah: The Clear Path," http://www.sunnipath.com/Library/ Articles/AR00000256.aspx. [Accessed September 15, 2006].

19 Yusuf al-Qaradawi, *The Lawful and the Prohibited in Islam,* undated, http://www.witness-pioneer.org/vil/Books/Q_LP/Int.htm. [Accessed May 17, 2007]. Shaikh al-Qaradawi is one of the leading Islamic scholars and jurists of our time. His works are widely read and respected in the Muslim world. He is also closely involved as one of the primary initiators of the European Council for Fatwa and Research.

20 *Encyclopaedia Britannica*. Students' Britannica India, Popular Prakashan, 200. See the entry "Shariah", p.382.

21 Salahi, A., "Does Islamic Law Need Modification?" *Arab News* (May 22, 2006).

22 Jamiatul Ulama's view on Shari'ah: http://www.muslimtents.com/aminahsworld/ Shariah.html. [Accessed July 2, 2006].

23 Official Saudi document, "Human Rights in Judicial System," 2000, Patnubay.com. http://patnubay.com/pdfs/Judicial%203%20–%20Human%20Rights%20in%20Judicial%20System%20of%20Saudi%20Arabia.pdf. [Accessed September 20, 2006].

24 Sistersinislam.org. "Reforming Family Law in the Muslim World," undated, http://www.sistersinislam.org.my/baraza/reforming.htm. [Accessed August 21, 2006].

25 Ahmad, K., "Implementation of Shariah," 1998, translated from the Urdu original in *Tarjumanul Qur'an* Isharat, http://www.khilafahparty.org/News10.htm. Khurshid Ahmad is a prominent leader and intellectual of Jamaat-e-Islami Pakistan.

26 Islamicity.com. Shariᶜah in Islamic Banking Glossary, undated, http://www.islamicity.com/finance/IslamicBanking_Glossary.asp. [Accessed August 22, 2006].

27 Al-Raysuni, 2005, p.xii.

28 Ibid., p.xi.

29 Choudhury, M. A. and Shakespeare, R., *The Universal Paradigm and the Islamic World-System: Economy, Society, Ethics and Science* (Singapore: World Scientific Publishing Company, 2007).

30 Choudhury, M. A.,"Development of Islamic Economic and Social Thought," in Hassan K., and Lewis, M., (eds.), *Handbook of Islamic Banking* (Cheltenham, UK: Edward Elgar, 2007), p.22.

31 Nyazee, 2000, p.24.

32 Weiss, B. G., *The Search for God's Law: Islamic Jurisprudence in the Writings of Sayf al-Din al-Amidi* (Salt Lake City, Utah: University of Utah Press, 1992), pp.1–2.

33 As part of the legacy of al-Juwayni "Amidi stands as a towering figure, notwithstanding the undeniable importance of Juwayni's immediate disciple, Abu Hamid al-Ghazali. This commanding position is due in part to the sheer comprehensiveness of Amidi's *opus magnum*, his *al-ihkam fi usul al-ahkam*. ... In the *Ihkam* Amidi covers the entire range of theoretical-jurisprudential issues (*masail*), leaving no issue known to him untouched. ... It is a tribute to the achievement of Amidi and Razi that their works were, according to Ibn Khaldun, the primary basis for two important later compendia of jurisprudence, the *Minhaj al-wusul* of Baydawi [d. 1286 CE] and the *Mukhtasar al-muntaha al-usuli* of Ibn al-Hajib [d. 1248 CE], upon the latter of which al-Iji (d. 1355 CE), the paragon of later Muslim theologians, commented" (Weiss, 1992, pp.20–22; date format edited for consistency). It should be noted that Muslims generally understand *ahkam* not as "categorizations," but as "rulings."

34 With regard to revelation and the Prophetic Hadith, the majority of Muslim scholars consider this issue into two categories:
(1) The Prophet expresses his sayings and actions in his own language with thematic meanings, which are formally revealed to him by God. This category represents the majority of the classical Prophetic Tradition known as Sunnah/Hadith. See Mohammad ibn Idris al-Shafiᶜi, *Al-Risalah*, edited by Ahmad Shakir (Beirut: Dar al-Kutub al-ᶜIlmiyyah, 2009), pp.88–89, and see Yusuf al-Qaradawi, *Approaching the Sunnah* (Herndon, Virginia, USA: IIIT, 2006), p.8.
(2) The Prophet's expression or action is predicated on personal experience or subjective predilection. In the majority of such instances, God acknowledges and confirms his action or expression (indicating that his preference is in accord with the Divine preference), while in very few instances his

personal choices or subjective predilection are redirected by a categorical revelation from God (this redirection protects the Prophet from allegations of mendacity and human oversight to Divine prescription and recommendation). See al-Shafiʿi, *Al-Risalah*, p.104, and al-Khatib al-Baghdadi, *Al-Faqih wa al-Mutafiqqh*, edited by Abu Abd al-Rahman Adil ibn Yusuf al-Azazi (Saudi Arabia: Dar ibn al-Jawzi, 1421 AH), p.92.

A typical example of this category is an incident narrated by Abu Bakr al-Bazzar in his *Al-Musnid al-Muʿalal*, hadith number: 503, in which the Prophet visited a date palm plantation in Madinah. Those around him began to guess the amount of dates that could be harvested from the plantation. Seeing their disparity the Prophet made his own guess whereupon the people remarked, "Allah and His Prophet have spoken the truth." To check them from misconstruing his subjective guess as a Divine prescription, he said to them: "Oh People, I am but a mortal, whatever I relate from God is but the Truth, but whatever I say from my personal predilection is subject to either oversight or veracity, because I am human."

35 Asad, M., *This Law of Ours*, p.25.

36 Ibid., p.26.

37 Merriam-Webster Dictionary, http://www.m-w.com/dictionary/divine. [Accessed November 29, 2006].

38 Mawdudi, S. A. A., *Islamic Law and Constitution*, 8th edn. (Lahore, Pakistan: Islamic Publications, 1983), p.92, quoting Ibn Taymiyyah, *Fatawa* (Cairo: Matbaʿah Kurdistan al-ʿIlmiyyah, 1326 AH), vol. I, p.406.

39 Weiss, 1992, p.254.

40 See Ibn Hajar al-ʿAsqallani, the introduction of *Fath al-Bari Sharh Sahih al-Bukhari* (Riyadh: Dar al-Salam, 2000), chapter II, pp.43–47.

41 The six collections of Hadith are exactly *Sahih al-Bukhari, Sahih Muslim* and (generally acknowledged), Abu Dawud, Tirmidhi, Nasa'i, and Ibn Majah.

42 Maqdisi was a noted sixth century (AH) scholar and contemporary of Ibn Salah. He wrote *Risalat al-Hafiz Mohammad ibn Tahir al-Maqdisi fi Shurut Kutub al-A'immah al-Sittah*. Muhammad ibn ʿUthman al-Hazimi is another scholar (d. 1188 CE), who probed into determining the criteria used by the Hadith compilers. His book is *Shurut al-A'immah al-Khamsah*, (ed.), M. Z. al-Kauthari (Cairo: n.d.).

43 Azami, M. M., *Studies in Hadith Methodology and Literature* (Indianapolis, Indiana: American Trust Publications, 1977), p.90.

44 Weiss, 1992, p.13.

45 El Fadl, K. A., *The Great Theft* (San Francisco, California: Harper, 2004).

46 AbuSulayman, 1993, p.5.

47 Usmani, M. T., "The Islamization of Laws in Pakistan: The Case of Hudud Ordinances," *Muslim World*, 96 (2), (April 2006), p.289. *Hudud* means punishment for certain offences fixed or prescribed in the Qur'an.

48 Also, no verse of the Qur'an should be regarded as abrogated, which essentially renders such a verse irrelevant and useless thereafter. Also see, Dr. Taha J. Alalwani, *Nahwa Mawqif Qur'ani min al-Naskh* [Towards a

Qur'anic Position on Abrogation] (Egypt: Maktabah al-Shuruq al-Dawliyyah, 2007), in which he rejects the concept of abrogation.

49 The author uses the phrase "less divine." This needs explanation and qualification to avoid confusion. Essentially the Shari'ah is the divine law, as stated in the Qur'an and the Sunnah (see verses: 42:13; 45:18; and 59:7), while fiqh is the law derived by *fuqaha'* (jurists) from the Qur'an and the Sunnah using tools of deductive reasoning under the umbrella of the science of *Usul al-Fiqh*, tools such as Ijma', *Qiyas*, etc. discussed in more detail elsewhere in the book. In terms of being divine we have to distinguish that which is divine from that which has been unwarrantably enlarged by scholars over the centuries. By enlarged is meant substantial expansion by way of scholastic views and opinions. Those elements of the Shari'ah comprising *Hadith Qudsi*, *mutawatir ahadith*, and truly authentic Hadith can be considered divine. By truly authentic is meant those *ahadith* which do not contradict the Qur'an, do not betray the Prophet's character or message, and of course whose chain of transmission is very strong. Those comprising (the greater part in fact) of *fiqhi* rulings arrived at via deductive reasoning cannot be considered divine. The great *fuqaha'* were careful to note their fallibility and to stress that their rulings were not intended for all time. However, with the passing of centuries these rulings continued, ultimately becoming entrenched, with ijtihad and *Maqasid al-Shari'ah* ever marginalized as valid tools in the juristic process. So much so that later generations of Muslims came to regard the rulings, albeit of the great *fuqaha'*, as sacred, inviolable, and a divine part of the Shari'ah, giving them a status the *fuqaha'* had never intended. Furthermore, *we need to be extremely careful using terminology such as divine* and be crystal clear as to what this means in practice and what this refers to. Traditions of the Prophet cannot be given the undisputed authenticity of the Qur'an. The Qur'an stands unique and alone and not on a par with anything else. The problem occurs with ideas of equivalence, the Shari'ah is divine in the sense we have mentioned, but not divine in the sense of being equivalent to the Qur'an.

We may wonder at the *Hadith Qudsi*, *mutawatir* as well as truly authentic *ahadith* of the Prophet not being huge in number. This is precisely the great scope and strength of the Shari'ah, for this conciseness protects against legal and social stultification – in other words the chaining of the present to the past – allowing room to take account of the changing human condition, categorically the changes of time or circumstance. (Editor).

50 Guraya, 1993, pp.2, 9.

51 "Let Us Be Muslims," http://web.youngmuslims.ca/online_library/books/let_us_be_muslims/ch2top11.html.

52 Esposito, 2005, p.84. The cited years are in AD.

53 Arabic original, *Taghayur al-Ahkam bi Taghayur al-Zaman wa al-Makan*. Zahraa, M., "Characteristic Features of Islamic Law: Perceptions and Misconceptions," *Arab Law Quarterly*

15(2) (2000), pp.168–196, quoting Ibn al-Qayyim al-Jawziyyah, *I'lam al-Muwaqqi'in 'an Rabb al-'Alamin* (Beirut: Al-Maktabah al-'Asriyyah, 1987), vol. 3, pp.14–70.

54 Ibid., p.184, quoting Ibn al-Qayyim al-Jawziyyah. Op. cit., vol. 1, pp.110–111.

55 Guraya, 1993, p.58. It is notable that the notion of immutability of the Shari'ah is so entrenched that even Guraya contradicts himself in another place in his book, where he states: "The Holy Qur'an and the Sunnah of the Holy Prophet provide universal, eternal and immutable Divine guidance for *all countries in the world*," [p. 9; emphasis added].

56 Al-Khuli, M., "A Complete Code of Life," excerpts from *The Need for Islam*, http://www.islamway.com/newenglish/bindex.php?section=article&id=169. [Accessed May 25, 2007].

57 Luni, A. K., "Islam in the Eyes of Western Media," *Pak Tribune* (September 22, 2006).

58 Sarker, M. A. A., "Islamic Banking in Bangladesh: Performance, Problems & Prospects," *International Journal of Islamic Financial Services* 1(3), (October-December, 1999), pp.12–28.

59 Qazi Hussain Ahmed, "Islam & Politics," http://www.jamaat.org/qa/politics.html. [Accessed July 2, 2006]. He is the current *amir* (leader) of Jamaat-e-Islami, Pakistan.

60 Shaheed, F., "Controlled or Autonomous: Identity and the Experience of the Network Women Living Under Muslim Laws." Occasional Paper, http://www.wluml.org/search/node/%E2%80%99Controlled%20or%20Autonomous.

61 Zahraa, M., "Characteristic Features of Islamic Law: Perceptions and Misconceptions," *Arab Law Quarterly* 15(2) (2000), p.170.

62 Examples of such cocktails include: (a) Libyan dictator Muammar Qaddafi's Green Book representing his ideology, which includes the following tenets: "authority of the people," socialism and "social basis of the third universal theory." In another variation, his ideology is often described as Islamic socialism. (b) Indonesia's late Sukarno's *Pancasila*: Nationalism, Internationalism ('one nation sovereign amongst equals'), Representative democracy (all significant groups represented), Social Justice (Marxist influenced), Theism (with a secular bent).

63 Kamali, 2003, p.37, quoting Abu Ishaq al-Shatibi, *Al-Muwafaqat fi Usul al-Ahkam* (Cairo: Matba'ah al-Salafiyyah, 1341 AH), vol. iii, p.219.

64 Gulf-Law, "Companies in Islamic (Shari'ah) Law," Gulf-Law.com, http://www.gulf-law.com/uaeco-law_shariah.html. [Accessed August 5, 2008].

65 Lender's Shariah Advisors. http://www.islamicmortgages.co.uk/ index.php?id =112. [Accessed August 16, 2006].

66 Mufti Muhammad Taqi Usmani, http://www.muftitaqiusmani.com/index.php?option=com_content&view=article&id=7:present-financial-crisis-causes-and-remedies-from-islamic-perspective-&catid=2:news-a-events&Itemid=20.

67 Jackson, S. (Abdul Hakim), "Sources of Islamic Law," undated,

http://www.aals. org/am2004/islamiclaw/islamicmaterials.pdf#search=%22sharia%20%22islamic%20law%22%2, p.7. [Accessed August 29, 2006].

68 Weiss, B. G., *The Spirit of Islamic Law* (Athens, Georgia, USA: University of Georgia Press, 2006), p.1.

69 Ali, A. Y., *The Holy Qur'an: Text, Translation and Commentary,* 2nd U.S. edn. (New York: Tahrike Tarsile Qur'an, 1988), fn no. 4756.

70 Khan, M. M., (trans.), *Sahih al-Bukhari*, vol. 1, p.15.

71 Munir, L. Z., "General Introduction to Islamic Law," undated, http://www.lfip. org/laws718/docs/lily-pdf/Introduction_to_Islamic_Law.pdf, p.4. [Accessed August 16, 2006].

72 Ibid., p.8.

73 Ibid., p.11.

74 Khan, M. M., (trans.), *Sahih al-Bukhari*, vol. 9, hadith no. 391.

75 Ibid., vol. 2, hadith no. 38.

76 Hakim, K. A., "Law and Islam," 1987, http://muslimcanada.org/ch20hakim.html.

77 Munir, undated, p.12.

78 Ramadan, 2004, p.33.

79 Usmani, 2006, p.288.

80 Randeri, S. A. R. L., *Fatawa Rahimiya* (Gujarat, India: Maktaba Rahimiyyah, 1975–1982), vol. 1, p.147. For more about the traditional perspective on this subject of *tarik al-salat*, for example, Shaykh Uthaymeen quotes Ibn Hanbal: "Whoever abandons the Salat has disbelieved and there is nothing other than that which, if it is abandoned, is Kufr besides the Salat. And whoever abandons it is a Kafir and Allah has made killing him Halal. He who abandons salaat is a Kafir (a disbeliever) with kufr that ejects him outside the fold (of Islam), deserving of execution if he did not repent or perform Salat." The author did not provide a citation for Ibn Hanbal's opinion or that of the other Imams. Uthaymeen, M. I., "The Ruling Regarding one who Abandons Salaat," undated, http://www.salafi-manhaj. com/pdf/SalafiManhaj_AbandoningSalat.pdf. [Accessed September 1, 2006]. It is noteworthy that Abu Hanifah, al-Shafiʿi and Malik differed with Ibn Hanbal claiming that the person concerned is a *fasiq* (a sinner), but not a *kafir* (disbeliever). Furthermore, three of the four Imams differed among themselves over the punishment. According to al-Shafiʿi and Malik, such a person should be killed, whereas Abu Hanifah held that he should be advised, but not killed. "Neglecting of Salah," http://www.khyber.org/betak/viewtopic.php?f=2&t=1169. [Accessed August 21, 2006].

81 Also, see surahs *al-Nahl*, 16:82; *al-ʿAnkaboot*, 29:18; *Ya-Sin*, 36:17; *al-Taghabun*, 64:12.

82 Laliwala, J. I., *The Islamic Jurisprudence* (New Delhi: India: The Indian Institute of Islamic Studies, 1983), p.1.

83 Farooq, M. O., "Rape and Hudood Ordinance: Perversions of Justice in the Name of Islam," (2006).

84 Farooq, M. O., "Riba, Interest and Six Hadiths: Do we have a Definition or a Conundrum?" *Review of Islamic Economics*, vol. 13, No. 1, 2009, pp.105–142.

85 A collection of the frequent disagreements between the main Hanafi protagonists occurs in *Hidayah* and is available in the following document:

"How much agreement/disagreement even within one school of Fiqh?" retrieved August 6, 2006, from Web site: http://globalwebpost.com/farooqm/ study_res/ islam/fiqh/ijma_hedaya.html.

86 Theologians or those who practice *kalam* or debate involving theology.

87 Al-Amidi, S., *Kitab al-Ihkam fi Usul al-Ahkam*, 4 vols. (Cairo: Dar al-Kutub al-Khidiwiyyah, 1914), vol. iv, p.162; al-Shawkani, M., *Irshad al-Fuhul*, 1st edn. (Riyadh, Saudi Arabia: Dar Al Fadilah, 2000), vol. 2, p.1062.

88 Guraya, 1993, p.63, quoting Ibn al-Muqaffaᶜ (d. 756 CE), *Rasa'il al-Bulagha'*, (ed.) Muhammad Kurd Ali (Cairo, Egypt: Matbaᶜat Lajnat al-Ta'lif wa al-Tarjamah wa al-Nashr, 1954), p.126.

89 Farooq, M. O., "Religious denunciations and Takfir: Isn't there enough to go around?" (2006). http://www.globalwebpost.com/farooqm/ writings/islamic/takfir.html.

90 Many people are familiar with disagreement (*ikhtilaf*) at the inter-*madhhab* level. For more on the intra-*madhhab* level, see note no. 85 above.

91 Kahoe, R., "Taking a Look at Legalism," *Mainstream Messenger* 3(2) (April 2000).

92 Biblica., *Holy Bible: New International Version* (Colorado Springs, CO: Biblica, 1984).

93 "Do not think that I have come to abolish the Law of the Prophets; I have not come to abolish them but to fulfill them" *Holy Bible (NIV)*, Matthew 5:17. Yet, by arguing that the law – the legacy of Moses – is completely subsumed in one Christian law: "Love thy neighbor," Saint Paul presumably liberated the people from its burden. Paul asserts: "Your only obligation to others is to love one another; because he who loves another has fulfilled 'the law'" [Romans, 13:8]. Thus, it is courtesy of Paul's teaching, contrary to Jesus' that Christians are able to eat pork and are not required to perform circumcision (of their males), both practices which contravene Mosaic Law. While Paul's influence on Christianity is characterized as antinomianism (i.e., moral laws not being binding on Christian believers), this has not prevented legalism from creeping into Christianity. Aninomianism is precisely the opposite extreme of legalism. Roman Catholicism charges Protestantism with antinomianism, while the latter charges the former of legalism. For further details, see Badenas, R., *Christ the End of the Law: Romans 10.4 in Pauline Perspective* (Sheffield, UK: Sheffield Academic Press, 1985); Dunn, J., *Jesus, Paul and the Law: Studies in Mark and Galatians* (Louisville, USA: Westminster/ John Knox Press, 1990).

94 Khan, M. M., (trans.), *Sahih al-Bukhari*, vol. 1, hadith no. 69.

95 Ibid., vol. 8, hadith no. 658.

96 Ibid., vol. 8, hadith no. 110.

97 Khan, M., "The Priority of Politics," *Boston Review* (April/May 2003), http://www.bostonreview.net/BR28.2/khan.html. [Accessed October 7, 2006].

98 Emerick, Y., "The Fight for the Soul of Islam in America," undated, http://www.islamfortoday.com/ emerick12.htm. [Accessed August 2, 2006].

99 Church, George, "An Exquisite Balancing Act," *Time*, September 24, 1990, http://www.time.com/time/magazine/article/0,9171,971191,00.html. [Accessed July 29, 2007].

100 For details, with references, see Farooq, "Religious denunciations and Takfir: Isn't there enough to go around?" (2006).

101 Siddiqi, A. H., (trans.), *Sahih Muslim*, vol. iv, hadith no. 6621.

102 Ibid., hadith no. 6450.

103 Ibid., hadith no. 6874.

104 Hasan, A., (trans.), *Sunan Abu Dawud*, 1990, vol.iii, Kitab al-Adab, hadith no. 4883.

105 Siddiqi, A. H., (trans.), *Sahih Muslim*, vol. iv, hadith no. 6221.

106 *Deccan Herald*, "Muslim women form their own personal law board," (February 3, 2005).

107 Farooq, M. O., "Exploitation, Profit and The Riba-Interest Reductionism." Unpublished paper presented at the Annual Conference of Eastern Economic Association, New York, February 23–25, 2007.

108 El Fadl, K. A., *Place of Tolerance in Islam* (Boston, Massachusetts: Beacon Press, 2002), pp.4–5.

109 Farooq, M. O., "O Allah! You are My Servant and I am Your Lord: The Language of Love" (2003), http://www.islamicity.com/articles/Articles.asp?ref=IC0305–1978. [Accessed June 21, 2007].

110 Siddiqi, A. H., (trans.), *Sahih Muslim*, Kitab al-Hudud, hadith no. 4205, hadith no. 4207. Other cases, where some Jews brought cases of adultery against a few of their own kind resulting in their being stoned to death, were dealt with in accordance with Judaic law. See Khan, M. M., (trans.), *Sahih al-Bukhari*, vol. 2, hadith no. 413.

111 Farooq, M. O., "Rape and Hudood Ordinance: Perversions of Justice in the Name of Islam," (2006).

112 Emerick, op. cit., undated.

113 Shaheed, F., "Controlled or Autonomous: Identity and the Experience of the Network Women Living Under Muslim Laws." Occasional Paper, quoting Riffat Hassan, http://www.wluml.org/search/node/%E2%80%99Controlled%20or%20Autonomous.

114 Looklex, "Sharia," *Encyclopedia of the Orient*. http://i-cias.com/e.o/sharia.htm. [Accessed March 15, 2007].

115 Khan, M., "The Priority of Politics," (2003).

116 Farooq, M. O., "Fundamental Human Dignity and the Mathematics of Slavery," Unpublished essay (2006), http://www.globalwebpost.com/farooqm/writings/islamic/slavery_math.html. [Accessed June 21, 2007].

117 See the section on "Marriage, Contract and Sale" in Chapter Five (*Qiyas*) of this book.

118 Hanbal, A. ibn, *Musnad Ahmad* (Beirut, Lebanon: Dar al-Kutub al-ʿIlmiyyah, 1993), hadith no. 6762.

119 Al-Qayrawani, A. A., *The Risala: A Treatise on Maliki Fiqh*, trans. by Alhaj Bello Mohammad Daura, undated, http://www.iium.edu.my/deed/lawbase/risalah_maliki/book32a.html; see the Chapter on Marriage and Divorce. The minimum waiting period before obtaining a divorce seems to be four years. Al-Qayrawani's view is based on the

Maliki school. Also see Kamali, M. H., *Shariah Law: An Introduction* (Oxford: One World, 2009), p.75. However, some schools stipulate an almost indefinite period of time. "A Hanafi wife is only entitled to a judicial annulment (*faskh*) of her marriage if her husband is proved totally incapable of consummating the marriage, or when he becomes a missing person and ninety years elapse since the date of his birth." Kamali, M. H., *Law in Afghanistan: A Study of the Constitutions, Matrimonial Law and the Judiciary* (Leiden, Netherlands: Brill, 1985), p.160. Al-Qayrawani's view is based on the Maliki school, which the Hanafi school concurs with.

120 Farooq, M. O., "Exploitation, Profit and The Riba-Interest Reductionism," (2007).

121 Guraya, 1993, pp.24–25, citing Ibn al-Qayyim, *I'lam al-Muwaqqi'in*.

122 For elaboration on the theme of the verse, see Farooq, M. O., "Freedom and Choice: The First Order Condition of Islam," *Message International*, 30(4/5) (Apr.-May, 2004), pp.19–21.

123 Even the children or family members of a prophet do not automatically become or remain submissive to God. This is their own choice as adults according to the teaching of Islam. The story of Prophet Nuh (Noah), his wife and son in the Qur'an (*Hud*, 11: 42–47; *al-Tahrim*, 66: 10) and the wife of Prophet Lut (Lot) (*Hud*, 11: 81; *al-Hijr*, 15: 59–60) are testimony to this.

124 Al-Nabhani, T., *The System of Islam* [Nidham ul-Islam]. Eng trans. 2002, http://www.hizb-ut-tahrir.org/PDF/EN/en_books_pdf/system_of_islam.pdf, p.116. [Accessed June 21, 2007]. No individual translator's name is provided.

125 That people are born Muslim or non-Muslim is an even more fundamental misunderstanding. It would be correct to state that a person is born into a Muslim or non-Muslim family, but not that they were born as a Muslim or non-Muslim. Indeed, the Prophet is known to have said that all humans are originally Muslim or born on *fitrah* (innate human nature), but that their parents raise them according to their own specific beliefs. See Farooq, M. O., "Being born as a Muslim: Is there such a thing?" 1999, comments posted at NABIC-L, an internet forum, http://www. globalwebpost.com/farooqm/writings/islamic/born_muslim.html. [Accessed July 27, 2006].

126 For a unique collection of 100+ opinions about Islam and apostasy, see http://apostasyandislam.blogspot.com. [Accessed July 15, 2007].

127 Farooq, M. O., "Apostasy, Freedom and Da'wah: Full Disclosure in a Business-like Manner," (2007), http://theamericanmuslim.org/tam.php/features/articles/ apostasy_freedom_and_dawah_full_disclosure_in_a_business_like_manner/. [Accessed June 21, 2007].

128 For more, see Farooq, M. O., "Women Scholars of Islam: They Must Bloom Again," *Message International*, 28(8/9) (Aug.-Sept. 2003), pp.27–33.

129 Farooq, M. O., "Freedom and Choice: The First Order Condition of Islam," (2004), p.21.

130 Ibid.

131 Ali, A. Y., 1988, fn no. 434.

132 El Fadl, *The Great Theft* (San Francisco, California: Harper, 2004), pp.14–15.

133 Farooq, M. O., "The Spirit of Global Belonging: Perspectives from Some Humanity-Oriented Icons," (2006), http://www.nazrul.org/ works_on_ nazrul/ articles/global-belonging. doc. [Accessed June 21, 2007].

134 Farooq, M. O., "Islam and Democracy: Perceptions and Misperceptions," *Message International* 27(4/5) (April-May 2002), pp.17–19.

135 Siddiqi, A. H., (trans.), *Sahih Muslim*, vol. iii, hadith no. 4187.

136 Some may raise the question of certain alleged privileges of the Prophet that seem to be exceptional. One example of this is his marrying up to thirteen wives simultaneously, whereas Islam restricts the maximum number to four (incidentally, lest it is misunderstood, the Qur'an's permission to marry up to four wives at the same time is not unconditional. Rather it is contextual and subject to strict regulations, even though traditionalist interpretations of Islam have made this permission unconditional). As far as exceptions to the Prophet are concerned, generally speaking, all laws still applied equally to him. Confirmation of this is the thrust of the well known statement that even his own daughter could not expect or receive any special treatment regarding justice and the rule of law. It is important to note that as a statesman and leader the Prophet also had exceptional obligations. For example, the late night prayer of *tahajjud* was *wajib* for the Prophet, but is only highly recommended for ordinary Muslims. In the case of the number of wives exceeding the normal limits, the Prophet contracted marriage to some on the basis of securing inter-communal relations (between the Islamic polity and outside tribes), or to protect widows and older women. This was always on the understanding that his wives would not seek worldly amenities, satisfied instead with the honor of being known as spouses of the Prophet. Regarding rules, laws and matters of justice, the Prophet always subjected himself to the standard and codes he applied to his followers, about which there is no dispute.

137 Ali, A. Y., 1988, fn no. 434.

138 Abu-Nimer writes: "Fasting is one of the main values and practices with which Gandhi associated Islam, particularly during his early imprisonment." See Shella McDonough, *Gandhi's Responses to Islam* 122 (New Delhi, India: D.K. Printworld, 1994); Chaiwat Satha-Anand, "Core Values For Peacemaking in Islam: The Prophet's Practice as Paradigm," in *Building Peace in the Middle East: Challenges for States and Civil Society*, Elise Boulding, (ed.), (Boulder, Colorado: Lynne Reinner Publishers, 1993). Abu-Nimer, M., "A Framework for Non-Violence and Peacebuilding in Islam," *Journal of Law and Religion* 15(1/2) (2001), p.219.

139 Farooq, M. O., "Toward Understanding Muhammad: Some Issues in Peace and Violence," *Message International*, 27(8/9) (Aug-Sept, 2000), pp.15–19.

140 Abu-Nimer, 2001, p.220.

141 El Fadl, 2004, p.17.

142 Asad, M., *This Law of Ours*, pp.30–31.
143 Siddiqi, A. H., (trans.), *Sahih Muslim*, vol. iv, hadith no. 6221.
144 It is narrated on the authority of ʿAbdullah son of ʿUmar that the Messenger of Allah said: "(The superstructure of) al-Islam is raised on five (pillars), testifying (the fact) that there is no god but Allah, that Muhammad is His servant and messenger, and the establishment of prayer, payment of zakah, pilgrimage to the House (Kaʿbah) and the fast of Ramadan." (Siddiqi, A. H., (trans.), *Sahih Muslim*, vol. i, hadith no. 20).
145 Farooq, "Rape and Hudood Ordinance: Perversions of Justice in the Name of Islam" (2006).
146 Siddiqi, A. H., (trans.), *Sahih Muslim*, vol. i, hadith no. 432.
147 El-Gamal, M., *Islamic Finance: Law, Economics and Practice* (New York: Cambridge University Press, 2006), p.xii.
148 El Gamal, 2006, p.8.
149 Farooq, M. O., "Exploitation, Profit and The Riba-Interest Reductionism" (2007).
150 Nyazee, 2000, p.309. Notably, the value-oriented approach, suggested and articulated in this book, is independent of the term used by Nyazee. Only as part of research did this author come across Nyazee's use of the same term, employed without any meaningful elaboration.
151 Ibid., p.39; also p.202.
152 Ibid., p.39.
153 Ibid., p.205.
154 Ibid., p.314.
155 Abu Zahrah, M., "The Fundamental Principles of Imam Malik's Fiqh," undated, http://www.iium.edu.my/deed/lawbase/maliki_fiqh/usul8.html. Chapter One, quoting al-Shatibi, *al-Muwafaqat,* vol. 3, p.247.

CHAPTER 3

1 Muhammad Asad, *This Law of Ours*, p.28.
2 Kazi, M., *A Treasury of Ahadith* (Jeddah, Saudi Arabia: Abul-Qasim Publishing House, 1992), pp.1–2.
3 Ibid., p.2.
4 Alauya, S., *Fundamentals of Islamic Jurisprudence* (Manila, Philippines: Rex Book Store, 1999), p.24.
5 Ibid., p.40.
6 Ibid., p.42.
7 Ibid., p.43
8 Khadduri, M., (trans., with introduction and notes), *Al-Shafi'i's Risala: Treatise on the Foundations of Islamic Jurisprudence*, 2nd edn. (Cambridge, UK: The Islamic Texts Society, 1987), pp.123–124.
9 Alauya, 1999, p.40.
10 AbuSulayman, A., *The Islamic Theory of International Relations: New Directions for Islamic Methodology and Thought* (Herndon, Virginia: International Institute of Islamic Thought, 1987), p.83.
11 Guraya, 1993, p.76.
12 Rahman, F., *Islamic Methodology in History* (Karachi, Pakistan: Central Institute of Islamic Research, 1965), pp.14–15.
13 It is no accident that a great many of the major compilers and Hadith specialists belonged to the Shafiʿi *Madhhab* (school of Islamic thought). "Among the specialists in the field of Hadith, for example, who were Shafi'is are such scholars as Bukhari, Muslim, Tirmidhi, Nasa'i, Ibn Majah, Abu Dawud, Ibn Kathir, Dhahabi, and Nawawi ..." Keller, N.

H. M., (trans., with introduction and notes), *Reliance of the Traveller* by al-Misri (Beltsville, MD: Amana Publications, 1994), p.vii.

14 Suhail, I. A. K., *What is Riba?* (New Delhi, India: Pharos, 1999), p.47.

15 Kamali, 2003, p.93.

16 Ibid., p.95 quoting Hasan, A., (trans.), *Sunan Abu Dawud*, 1990, vol. iii, hadith no. 3643.

17 Ibid., p.106.

18 Siddiqi, A. H., (trans.), *Sahih Muslim*, vol. ii, hadith no. 2511.

19 Ibid., hadith no. 2405.

20 Khadduri, M., (trans.), *Al-Shafi'i's Risala*, 1987, p.244, hadith no. 374.

21 Hasan, S., *An Introduction to the Science of Hadith* (London, UK: Al-Qur'an Society, 1994). See the section Rijal al-Hadith.

22 Alauya, 1999, p.51.

23 Siddiqi, M. Z., *Hadith Literature: Its Origin, Development & Special Features* (Cambridge, UK: Islamic Texts Society, 1993), pp.57–58.

24 Azami, 1977, p.92, referring to Suyuti, *Tarikh*, vol. i, p.134 and Ibn Hajar, *Hadi al-Sari*, vol.ii, p.106.

25 Siddiqi, M. Z., 1993, p.58.

26 Al-Hazimi, Abu Bakr Muhammad ibn Musa, *Shurut al-A'immah al-Khamsah*, ed. by M.Z. al-Kawthari, (bound with al-Qaysarani, *Shurut al-A'immah al-Sittah*), (Cairo, Egypt, n.d.). Maqdisi is apparently better known as al-Qaysarani. Both the works of al-Hazimi and al-Qaysarani are bound in one volume.

27 Siddiqi, M. Z., 1993, p.56.

28 Khan, Israr Ahmad, *Authentication of Hadith: Redefining the Criteria* (London,UK: IIIT, 2010), p.37.

29 Guraya, 1993, p.113, citing Abu Yusuf, *al-Radd 'ala Siyar al-Awza'i* (Hyderabad, India: 1938), pp.61, 76.

30 Al-Qaradawi, Y., *Islamic Awakening Between Rejection and Extremism* (Herndon, Virginia: International Institute of Islamic Thought, 1981), pp.84–85.

31 Khan, M. A., *Mostafa Charit* (originally in Bangla; Biography of the Honored One), 4th edn. (Dhaka, Bangladesh: Jhinuk Pustika, 1975), pp.42–51. For excerpts, translated by this author from Bangla, see, http://globalwebpost.com/farooqm/study_res/islam/hadith/ akram khan _hadith.html. [Accessed July 15, 2006].

32 Khan, M. M., (trans.), *Sahih al-Bukhari*, vol. 5, hadith no. 230.

33 Ibid., vol. 4, hadith no. 747–748, vol. 7, hadith no. 787; also Siddiqi, A. H., (trans.), *Sahih Muslim*, vol. iv, hadith no. 5794.

34 Siddiqi, A. H., (trans.), *Sahih Muslim*, vol. iv, hadith no. 5809, hadith no. 5805.

35 Khan, M. M., (trans.), *Sahih al-Bukhari*, vol. 6, hadith no. 67.

36 Ibid., hadith no. 129.

37 Siddiqi, A. H., (trans.), *Sahih Muslim*, vol. iii, hadith no. 3939.

38 Alauya reports that *al-Baqarah* 2:281 ("And fear the day when you shall be brought back to God. Then shall every soul be paid what it earned, and none shall be dealt with unjustly") is the last verse revealed contending that there is an Ijma[c] (consensus) on it which is untenable; after reading Chapter Four in this work readers should concur. Alauya states: "This was the consensus of the 'Ulama headed by Al-Suyuti on the authority of Abdullah Ibn 'Abbas who said the last verse revealed (referring to the above-quoted) and thereafter the Prophet lived only nine nights

and died on the night of Monday, the 13th day of Rabi' Al-Awwal." Regarding the argument of some other *'ulama'* that the last verse is ("This day have I perfected your religion for you, completed My favor upon you, and have chosen for you Islam as your religion" *al-Ma'idah*, 5:3), the argument is not well made because this verse was revealed while the Prophet was performing his farewell pilgrimage "... and he was at Arafat at the time of its revelation on one Friday after the 'Asr prayer. Therefore, the Prophet lived eighty-one (81) days and then died," (pp.16–17). So, which is the last revealed verse of the Qur'an? The answer remains as elusive as ever.

39 Khan, M. M., (trans.), *Sahih al-Bukhari*, vol. 3, hadith no. 344.
40 Ibid., hadith no. 388.
41 Also, Rahimuddin, M., (trans., with introduction and notes), *Muwatta Imam Malik* (Lahore, Pakistan: Sh. Muhammad Ashraf, 1985), Kitab al-Buyu, no. 1321.
42 Khan, M. M., (trans.), *Sahih al-Bukhari*, vol. 3, hadith no. 383.
43 Siddiqi, A. H., (trans.), *Sahih Muslim*, vol. iii, hadith no. 3853.
44 Farooq, M. O., "Islam and the Riba-Interest Equation: Reexamination of the Traditional Arguments," *Global Journal of Finance and Economics*, vol. 6, no. 2, September 2009, pp.99–111.
45 Usmani, M. T., *An Introduction to Islamic Finance* (The Hague, Netherlands: Kluwer Law International, 2002), p.113.
46 Siddiqi, A. H., (trans.), *Sahih Muslim*, vol. iii, hadith no. 3886.
47 Ibid., hadith no. 3888.
48 Ibid., hadith no. 3889.
49 Ibid., hadith no. 3891.
50 Ibid., hadith no. 3892.
51 Ibid., hadith no. 3893.
52 Ibid., hadith no. 3894.
53 Ibid., hadith no. 3895.
54 Ibid., hadith no. 3464.
55 Khan, M. M., (trans.), *Sahih al-Bukhari*, vol. 3, hadith no. 570.
56 Ibid., hadith no. 310.
57 Ibid., hadith no. 589.
58 Ansari, (trans.), *Sunan Ibn-i-Majah*, vol. 3, hadith no. 2205.
59 Ibid., hadith no. 2185, p.306.
60 Azami, 1977, p.43.
61 Siddiqi, M. Z., 1993, p.110.
62 Kamali, 2003, p.80.
63 Kamali, 2003, p.94.
64 Hallaq, W., "The Authenticity of Prophetic Hadith: A Pseudo-problem," *Studia Islamica* (89) (1999), pp.75–90, p.79, referring to al-Qarafi, *Sharh*, pp.349–350.
65 Kamali, 2003, p.94.
66 Azami, 1977, p.43.
67 Siddiqi, M. Z., 1993, p.110.
68 Hallaq, 1999, p.87.
69 Ibid., pp.78–79.
70 Ibid., p.84.
71 Hasan, S., "A Brief History of Mustalah al-Hadith," undated, http://www.islamic-awareness.org/Hadith/Ulum/asa1.html. [Accessed June 29, 2006].
72 Hallaq, 1999, p.84.
73 Ibid.
74 Kamali, 2003, p.97.
75 Ibid., p.98.
76 Ibid., pp.101–106.
77 Ibid., p.97.
78 Ibid., p.94.
79 Hallaq, 1999, p.85.
80 Ibid., p.88.
81 Kamali, 2003, pp.105–106.
82 Khadduri, M., (trans.), *Al-Shafi'i's Risala*, p.80, no. 28.

83 Farooq, M. O., "Religious denunciations and Takfir: Isn't there enough to go around?" (2006).

84 In keeping with the pluralistic norm and heritage of Islam, as exemplified in the Charter of Madinah under the leadership of the Prophet, instead of identifying a country as a "Muslim country," it is preferable to refer instead to a "Muslim-majority country."

85 Sharifi, A., "Tajikistan: Women Challenge Mosque Ban" (October 6, 2004), http://iwpr.net/report-news/tajikistan-women-challenge-mosque-ban.

86 Sunnipath, http://qa.sunnipath.com/issue_view.asp? HD=7&ID=8740& CATE =17. [Accessed May 5, 2006].

87 Hasan, A., (trans.), *Sunan Abu Dawud*, 1990, vol. i, hadith no. 570.

88 Khan, M. M., (trans.), *Sahih al-Bukhari*, vol. 1, hadith no. 828.

89 Unlike his peers from the other *madhhabs*, Imam Malik has often given preference to the *athar* over *ahad* reports if he found an *athar* more pertinent in establishing a position, even if this meant setting aside a hadith. "Malik has disregarded the Hadiths from the Prophet when they are not in conformity with the view which Malik prefers" (Guraya, 1993, p.117). "[I]n the *Muwatta* there is enough evidence to establish the fact that Malik uses the Hadiths from the Prophet as legal arguments, and accepts them only if they conform to similar conditions, otherwise he would prefer other arguments from other authorities. The other arguments could be from the Companions, the practice of Madinah, the considered personal opinion of Malik coupled with the statements of some ambiguous authorities and the Hadiths from the successors" (Ibid., p.123). Malik's approach is useful in gaining the realization that, while it is traditionally recognized that Hadith are one of the two primary sources of Islamic jurisprudence, in practice it has been used selectively by the jurisconsults.

90 Rahman, S. A., *Punishment of Apostasy in Islam* (New Delhi, India: Kitab Bhavan, 1996), p.72, citing the *Mukhtasar* of Sayyid al-Sharif al-Jurjani. Explanatory note for the word 'Sahabi' has been added by this author.

91 Khan, M. M., (trans.), *Sahih al-Bukhari*, vol. 9, hadith no. 219.

92 Sisters in Islam, "Women as judges," SIS Working Paper Series, undated, SIS web site, http://www.sistersinislam.org.my/BM/womenjudgescPart1.doc. [Accessed July 21, 2007].

93 Siddique, K., *The Struggle of Muslim Women* (Singapore: Thinkers Library, 1983), pp.56–59.

94 Mernissi, F., *Veil and the Male Elite: A Feminist Interpretation of Women's Rights in Islam* (Reading, Masschusetts: Perseus Books, 1987), pp.49–61, citing Ibn al-Athir, *Usd al-Ghabah*, vol. 5, p.38.

95 Haddad, G. F., "Abu Bakrah and the Feminists," 2005, website, retrieved on 5/21/07, http://www.abc.se/tm9783/o/abfm_e.html.

96 Engineer, A., "Qu'ran, Hadith and Women," *Islam and Modern Age* (February 2008), World Muslim Congress web site, http://world-muslimcongress.blogspot.com/2008/02/quraan-hadith-and-women.html. [Accessed March 3, 2008].

97 Musa, M. and Haque, M., (eds.) *Bidhibadhdha Islami Ain* (Codified Islamic Law), 2nd edn. 3 vols. (Dhaka, Bangladesh: Islamic Foundation, 2001), vol. i, p.149.

98 Mahomedy, M., (trans. with introduction and notes), *Bahishti Zewar* [Heavenly Ornaments] by Ashraf Ali Thanvi (Azaadville, South Africa: Madrasah Arabia Islamia, 1995). See the Chapter "Nikah (Marriage) in Islam." The Chapter is also available online, http://www.darululoom-deoband.com/english/books/nikah.htm#The%20Wali%20or%20Legal%20Guardian. [Accessed May 15, 2006].

99 Musa and Haque, 2001, vol. i, p.166.

100 Hamilton, C., (trans., with introduction and notes), *Al-Hedaya* by al-Marghinani, 2nd edn. (Karachi, Pakistan: Darul Ishaat, 1989), p.107.

101 As-Sarakhsi, 1993, vol. 4, p.219.

102 Ibid., p.43. Thanks to Dr. Muhammad al-Faruque, Associate Professor of Library Administration and Middle Eastern Studies at the University of Illinois, Urbana-Champaign who assisted in tracing this saying to one of the earliest and most highly regarded Hanafi scholars, al-Sarakhsi.

103 M. Faruque, personal communication. Dr. Faruque's comments only pertain to the tracing of the Hadith; he does not necessarily share the opinions, views or analysis shared in this book.

104 Nyazee, I. A. K., (trans., with introduction and notes), *Al-Hidayah: The Guidance* by al-Marghinani, vol. I. (Bristol, UK: Amal Press, 2006), p.496, no. 12.

105 Ibid., p.629.

106 Azami, 1977, p.44.

107 For one of the most thorough expositions of the traditional position, see the Chapter on Apostasy. Friedman, Y., *Tolerance and Coercion in Islam: Interfaith Relationships* (Cambridge, Massachusetts: Cambridge University Press, 2003).

108 Al-Nabhani, 2002, Article 7(c), p.116.

109 Mawdudi, S. A. A., *The Punishment of the Apostate According to Islamic Law,* trans. by Syed Silas Husain and Ernest Hahn (1994), http://answering-islam.org/ Hahn/ Mawdudi/ index.htm. [Accessed May 27, 2007].

110 Al-Qaradawi, Y., "Apostasy: Major and Minor," 2006. http://www.islamonline.net/servlet/Satellite?c=Article_C&cid=1178724001992&pagename=Zone-English-Living_Shariah/LSELayout.

111 Farooq, M. O., "Apostasy, Freedom and Da'wah: Full Disclosure in a Business-like Manner," (2007).

112 Qur'an: *Al-Baqarah*, 2: 256.

113 For detailed analysis of those commonly cited Hadith justifying the punishment of apostasy, see Saeed, A. and H. Saeed, *Freedom of Religion, Apostasy and Islam* (London, UK: Ashgate Publications, 2004); Subhani, M. E. A., *Apostasy in Islam* (New Delhi, India: Global Media Publications, 2004); Rahman, S., 1996.

114 Khan, M. M., (trans.), *Sahih al-Bukhari*, vol. 9, hadith no. 57. For a list of other sources where this hadith appears and a critical analysis of it, see Shafaat, 2007.

115 Kamali, M. H., *Freedom of Expression in Islam* (Cambridge, UK: Islamic Texts Society, 1997), referring to Shaltut, *Al-Islam ʿAqidah wa-Shariʿah*, pp.292–93.

116 Khan, M. M., (trans.), *Sahih al-Bukhari*, vol. 9, hadith no. 318.

117 One such weakness is that, taken literally, this hadith would seem to require the execution of the non-Muslim who changes his or her religion. According to Saeed (1994), "The Hadith, however, is rather general (*'amm*). On the basis of its literal meaning, it could be argued that once a person accepts a religion, he or she cannot change it whether it is Islam or Christianity or Judaism or other." There were scholars who have understood this hadith literally, without any restriction: "Imam Shafi'i and Ibn Hazm are reported to have expressed the view that the words of the Hadith being general, it would apply even to a disbeliever who changes his faith." There are others, including Malik, who have disagreed with Shafi'i and Ibn Hazm on this. See Rahman, S., 1996, chapter II.

118 A new blog "Apostasy and Islam" is now dedicated to this particular matter, where the views of 100+ scholars, jurists, academics, imams, etc. have been compiled. http://apostasyandislam.blogspot.com. [Accessed June 5, 2007]. Also see, Alalwani, Taha Jabir, *Apostasy in Islam: A Historical and Scriptural Analysis* (London, UK: IIIT, 2011).

119 See Chapter Four and Five of this book, where this issue is discussed in detail.

120 From the website of the followers of Rashad Khalifah, "Why Did Rashad Announce His Messengership?" http://www.submission.org/messenger/announce.html. [Accessed June 1, 2007].

121 Farooq, M. O., "Religious denunciations and Takfir: Isn't there enough to go around?" (2006).

CHAPTER 4

1 Kamali, 2003, pp.229–230.

2 AbuSulayman, 1987, pp.58–59.

3 Khadduri, M., (trans.), *Al-Shafi'i's Risala*, 1987, p.78.

4 Hasan, A., *The Doctrine of Ijma: A Study of the Juridical Principle of Consensus* (New Delhi, India: Kitab Bhavan, 2003). See Introduction.

5 Kamali, 2003, p.228.

6 Ibid., p.231.

7 Ibid., p.232.

8 Asad, *This Law of Ours*, p.51

9 Hasan, A., 2003, p.36.

10 Ibid., p.36.

11 Ibid., p.36.

12 Ibid., p.36.

13 Ibid., pp.149–150.

14 Vanker, Muhammad, "Three Talaqs," undated, http://www.umhlangaislamic. co.za/articles/talaaqs.htm. [Accessed March 5, 2007], referring to *Sharh Zarqani*, vol. 3, p.167.

15 "Regarding Tarawih." Retrieved April 23, 2007, from Web site: http://mac.abc.se /tonesr/h/91.html.

16 Siddiqui, S. H., *Islamic Banking: Genesis & Rationale, Evaluation & Review, Prospects & Challenges* (Karachi, Pakistan: Royal Book Company, 1994), p.15. There is no difference of opinion as far as *riba* is prohibited. Thus, there is an Ijma' or unanimity regarding this, even though this is not a matter of Ijma', because it is something that is explicitly in the Qur'an. However, when *riba* is equated with interest, then the

same quote/statement does not hold, because there are opinions that do not consider interest (in all form) as *riba*. Saeed, Abdullah, *Islamic Banking and Interest: A Study of the Prohibition of Riba and its Contemporary Interpretation* (New York: E. J. Brill, 1996); Saleh, Nabil A., *Unlawful Gain and Legitimate Profit in Islamic Law: Riba, Gharar and Islamic Banking* (Cambridge, UK: Cambridge University Press, 1996).

17 Imam al-Nawawi, *Al-Majmu' Sharh al-Muhadhdhab* (3:86), http://qa.sunnipath.com/ issue_view.asp?HD=3&ID=2190&CATE=343. [Accessed December 13, 2006].

18 http://www.beautifulislam.net/women/female_leadership_islam_p.html.

19 Referring to Mulla Ali al-Qari, http://qa.sunnipath.com/issue_view.asp?HD=7&ID=2987&CATE=108. [Accessed May 17, 2007].

20 Ibid., http://qa.sunnipath.com/issue_view.asp?HD=1&ID=1022&CATE=4. [Accessed May 17, 2007].

21 Ibid., http://qa.sunnipath.com/issue_view.asp?HD=1&ID=1115&CATE=4. [Accessed May 17, 2007].

22 "Sunnah Method and description of Wudhu," undated, http://www.central-mosque. com/fiqh/sunwudhu.htm. [Accessed May 17, 2007].

23 Referring to *Radd al-Muhtar ᶜala al-Durr*, 5/298–299, http://www.ummah.com/ forum/showthread.php?t=221148. [Accessed May 18, 2007].

24 http://www.pakistanlink.org/Religion/2005/07222005.htm.

25 http://www.londoninternational.ac.uk/current_students/programme_resources/laws/subject_guides/islamic/islamic_chpt3.pdf, p.20.

26 Referring to *Tarikh Baghdad*, vol. 13, p.383, http://en.rafed.net/index.php?option=com_content&view=article&id=1556&catid=187&Itemid=965]

27 http://al-islam.org/encyclopedia/chapter9/6.html. [Accessed May 15, 2007].

28 http://www.sunna.info/Lessons/islam_365.html.

29 Alawi al-Maliki, *Manhal*, 251–253, http://www.abc.se/tm9783/maa/ktda_e.html. [Accessed May 21, 2007].

30 Nyazee, 2000, pp.247–248.

31 Hasan, A., 2003, p.280; quoting al-Ghazali, *Al-Mustasfa min ᶜIlm al-Usul* (Cairo: Matbaᶜah Mustafa Muhammad, 1322–4 AH), vol. ii, p.141.

32 Mawdudi, 1983, p.92, quoting Ibn Taymiyyah. *Fatawa* (Cairo: Matbaᶜah Kurdistan al-ᶜIlmiyyah, 1326 AH), vol. i, p.406.

33 AbuSulayman, 1987, p.75; emphasis added.

34 Kamali, 2003, p.229.

35 For an itemized presentation of these disagreements, see "Disagreements in Hedaya," http://www.global-webpost.com/farooqm/study_res/islam/ fiqh/ijma_hedaya.html. [Accessed February 15, 2007]

36 Hasan, A., 2003, pp.72–82.

37 Al-Basri was a Muᶜtazilite scholar and *faqih* and author of *Al-Muᶜtamid fi Usul al-Fiqh*, a major source of influence in the field of *usul* until Fakhr al-Din al-Razi's celebrated work, *Mahsul*.

38 i.e., *Ahl al-hal wa al-ᶜaqd*.

39 Hasan, A., 2003, p.75.

40 Khadduri, M., (trans.), *Al-Shafi'i's*

Risala, 1987, Khadduri's Introduction, p.33.

41 Muslehuddin, M., *Philosophy of Islamic Law and the Orientalists* (New Delhi, India: Taj Company, 1986), p.146.

42 Khadduri, M., (trans.), *Al-Shafi'i's Risala*, 1987, p.37, n109.

43 Ibid., pp.38–39.

44 Muslehuddin, 1986, p.81.

45 Mawdudi, 1983, p.90.

46 Ibid., p.92.

47 al-Nabhani, 2002, p.118.

48 One of the issues on which an Ijma^{c} in general as well as *Ijma^{c} al-sahabah* exists is that the Qur'an as currently constituted is the same as that revealed to the Prophet, as preserved in written, standardized form since the time of the third *Khalifah* ^{c}Uthman. However, this view represents an Ijma^{c} pertaining only to the preservation of the Qur'an. The status of the Qur'an as the final, direct and verbatim *wahy* (divine revelation) from God to the Prophet Muhammad does not rest on any Ijma^{c} whatsoever. Rather, the Qur'an as divine revelation stands on its own. This is so because the Qur'an being a direct revelation from God is regarded as infallible, while no infallibility can be established for any other source. It is well established that there is no agreed upon evidence from the Qur'an to establish the infallibility of Ijma^{c}. However, if the Qur'an is used to establish the infallibility of Ijma^{c} and its status as a foundational source, and then Ijma^{c} in turn is used to establish the infallibility of the Qur'an and its status as the preserved revelation from God, this involves circular logic, which is untenable. Indeed, even in the case of the Hadith, though an indispensable foundational source, there is no question that it is not in the same infallible category as the Qur'an, as discussed in the previous chapter.

49 Indeed, the arbitrariness of the position becomes evident contending with the issue of who it is who constitutes a Companion (*sahabi*). Like all others who uphold *Ijma^{c} al-sahabah* as the only valid Ijma^{c}, Nabhani also had to deal with the issue of defining who is a *sahabi* (Companion). According to Nabhani (and his adherents), only those would qualify for *Ijma^{c} al-sahabah* who were Companions of the Prophet for at least one year or who fought one or more battles. Evidently, this criteria – companionship for ***one*** year or participation in at least ***one*** battle – is an arbitrary, fallible human construct. A notion that is claimed to be infallible (i.e., "not subject to error") and on a par with the Qur'an and Sunnah to be included in the foundational sources cannot be based on such a construct. If any such definition is needed, then the definition concerned needs to be treated as a working definition that should not be elevated to the level of dogma.

50 Khadduri, M., (trans.), *Al-Shafi'i's Risala*, 1987, p.350.

51 Mawdudi, 1983, p.92.

52 Ibid., pp.90–91.

53 Sh. Yusuf Talal DeLorenzo, "Introduction," pp. 1–9 in Thomas, A. (ed.) *Interest in Islamic Economics: Understanding Riba* (London, England: Routledge, 2006), p.7.

54 Alauya, 1999, p.65.

55 Hasan, A., 2003, p.17.

56 Kamali, 2003, p.236.

57 Ibid., p.67.
58 Ibid., p.232.
59 Ansari, (trans.), *Sunan Ibn-i-Majah*, vol. 5, Kitab al-Fitan, no. 3950, p.282.
60 Hasan, A., 2003, p.50.
61 Ibid., p.50.
62 Ibid., p.51.
63 Ansari, (trans.), *Sunan Ibn-i-Majah*, vol. 5, p.282; *da'if*, meaning weak.
64 Hasan, A., 2003, p.193.
65 Ibid., p.227; Kamali, 2003, p.255.
66 Refer to Chapter Three of this book for further details.
67 Hasan, A., 2003, p.172.
68 Weiss, 1992, p.254.
69 Hasan, A., 2003, p.180.
70 Khadduri, M., (trans.), *Al-Shafi'i's Risala*, 1987, p.318, no. 633–635.
71 Abu Zahrah, M. "The Fundamental Principles of Imam Malik's Fiqh," http://www.iium.edu.my/deed/lawbase/maliki_fiqh/usul5.html, quoting Ibn Hanbal from Ibn al-Qayyim. *I'lam al-Muwaqqi'in,* pt. 2, p.179.
72 Hasan, A., 2003, Chap. V.
73 Ibid., Chap. VI.
74 Ibid., Chap. VII.
75 Ibid., pp.58–60; also, Kamali, 2003, p.243.
76 Ibid., pp.60–61; Kamali, 2003, p.242.
77 Ibid., pp.61–63.
78 Ibid., 2003, p.78.
79 Ibid., p.105.
80 Ibid., p.105.
81 Ibid., Chap. VIII.
82 Ibid., Chap. X.
83 Dayal, B. M., (trans., with introduction and notes). *Durr-ul-Mukhtar* by al-Haskafi (New Delhi, India: Kitab Bhavan, 1992), vol. 2, p.351; also see in this book the next chapter on *Qiyas* for more details.
84 Ramadan, 2004, p.45.
85 Hasan, A., 2003, p.233.
86 Ibid., p.235.
87 Ibid., pp.235–238.
88 Kamali, 2003, pp.255–257.
89 Hasan, A., 2003, p.240.
90 Kamali, 2003, p.242.
91 Hasan, A., 2003, pp.246–248.
92 Ibid., p.248.
93 Kamali, 2003, p.257.
94 Hasan, A., 2003, p.254.
95 Sardar, Z., "Rethinking Islam," *Islam for Today* (June, 2002), http://www.islamfortoday.com/sardar01.htm. [Accessed on March 11, 2008); 'metier' means a trade, an occupation, or a profession.
96 AbuSulayman, 1987, p.76.
97 Mumisa, 2002, p.86.
98 Laliwala, 1983, pp.26–27.
99 Amal, T. A., "Observing the Contemporary Model of Ijma," 2004, http://islamlib. com/en/page.php?page=article&id=595. [Accessed February 23, 2007]; Masud, M.K., "Muslim Jurists' Quests for the Normative Basis of Shariah," Inaugural lecture at the International Institute for the Study of Islam in the Modern World, Netherlands (2001), http://www.isim.nl/files/inaugural_masud.pdf. [Accessed August 29, 2007].
100 AbuSulayman, 1987, p.84.

CHAPTER 5

1 For pertinent information and analysis of this unIslamic and inhumane experience, see Farooq, M. O., "Rape and Hudood Ordinance: Perversions of Justice in the Name of Islam." Also see Quraishi, 1997.

2 Hasan, M., "Women's personal law

board," The *Milli Gazette* (February 16–28, 2005).

3 Hasan, A, 2003, p.21.

4 AbuSulayman, 1987, p.2.

5 Hasan, A., *Analogical Reasoning in Islamic Jurisprudence: A Study of the Juridical Principle of Qiyas* (Islamabad, Pakistan: Islamic Research Institute, 1986), p.424.

6 Al-Qaradawi, undated, pp.14–15.

7 Muslehuddin, 1986, p.140.

8 AbuSulayman, 1987, p.66.

9 Muslehuddin, 1986, p.135.

10 Khadduri, M., (trans.), *Al-Shafi'i's Risala*, 1987, p.78.

11 Mawdudi, 1983, p.60.

12 Hasan, A., 1986, p.425, quoting Ibn Qutaybah, *Ta'wil Mukhtalif al-Hadith* (Cairo: Matbaᶜah Kurdistan al-ᶜIlmiyyah, 1326 AH), p.65.

13 Muslehuddin, 1986, p.136.

14 Hasan, A., 1986, Chapter Three.

15 Hasan, A., (trans.), *Sunan Abu Dawud*, 1990, vol. iii, hadith no. 3585.

16 Hasan, A., 1986, p.454, referring to Ibn Hazm, *Mulakhkhas Ibtal al-Qiyas wa al-Ra'y* (Cairo: Matbaᶜah Jamiᶜah Dimishq, 1960), p.14.

17 Khan, M. M., (trans.), *Sahih al-Bukhari*, vol. 9, Book of Holding Fast to the Qur'an and Sunnah, chapter 7 title – *Bab ma yudhkaru min dhamm al-ra'y wa takalluf al-qiyas*. p.305, and chapter 8 title – *wa lam yaqul bi ra'y wa la bi-qiyas*, p.307.

18 "It has been aptly argued that the headings of the various chapters of the *Sahih* constitutes the *fiqh* of Imam al-Bukhari" (Siddiqi, M. Z., 1993, p.57). An alternative view is that the chapter titles in al-Bukhari are not necessarily his own personal opinion, but what he regarded as the prevalent view.

19 Muslehuddin, 1986, p.137.

20 Hasan, A., 2003, p.130.

21 Muslehuddin, 1986, p.148.

22 Ibid., p.137.

23 Ibid., p.140.

24 Ibid., p.140.

25 Ibid., p.140.

26 Hasan, A., 1986, p.12.

27 Shehaby, N., "Illa and Qiyas in Early Islamic Legal Theory," *Journal of American Oriental Society* 102(1) (Jan-Mar, 1982), pp.27–46.

28 Fadel, M., Book Review of *Analytical Reasoning in Islamic Jurisprudence: A Study of Juridical Principle of Qiyas* by Ahmad Hasan, *The Journal of Law and Religion* 15(1/2) (2000–2001), pp.359–362.

29 Dunbar, K. "Analogy," undated, http://www.diplomacy.edu/Language/ Analogies/default.htm. [Accessed March 11, 2007].

30 Ibid.

31 Vosniadou, Stella and Ortony, Andrew, "Similarity and Analogical Reasoning: A Synthesis," pp.1–17 in Vosniadou, Stella and Ortony, Andrew, (eds.) *Similarity and Analogical Reasoning* (New York: Cambridge University Press, 1989), p.1.

32 Mistler, B., "Masters of Analogies: The GRE is to the MAT as Freud is to James," undated, accessed May 5, 2007 from APA Web Site: http://www.apa.org/apags/ edtrain/gre.html.

33 Kamali, pp.265–266.

34 Shehaby, 1982, p.42.

35 Moghul, U., "Approximating Certainty in Ratiocination: How to Ascertain the 'Illah (Effective Cause) in the Islamic Legal System and How

to Determine the *Ratio Decidendi* in the Anglo-American Common Law," *Journal of Islamic Law* (4) (Fall/Winter, 1999), p.19.

36 Hasan, A., 1986, p.2, referring to al-Ghazali, *Maqasid al-Falasifah*, Op.Cit., pp.39–40.

37 Ibid., p.128. The dates in this quote were given in AH. For the sake of consistency throughout this book, these have been substituted with CE.

38 Alauya, 1999, p.37.

39 The translation of the edition of *Hedaya*, from which the extract has been taken, is poor and composed in archaic English. Also, transliteration of some of the terms and names are not easily recognizable. Hence, some substitutions or annotations have been made to ensure that the excerpts in question are more understandable.

40 Hamilton, C., (trans.), *Al-Hedaya*, 1989, p.110.

41 Ansari, (trans.), *Sunan Ibn-i-Majah*, vol. 3, no. 1968.

42 Ibid., p.180. Madine is probably a mis-transliteration for Madini in Arabic. Note: *matruk* means abandoned or rejected because it is a tradition in whose chain of transmission someone known to be a liar is mentioned. For a detailed glossary, see Awliya'i, n.d.

43 Hasan, A., (trans.), *Sunan Abu Dawud*, 1990, vol. II, no. 2097.

44 Khan, M. M., (trans.), *Sahih al-Bukhari*, vol. 7, hadith no. 29. While in the translation, the narrator is listed as 'Ursa, it is probably an error. The original Arabic text of *Sahih al-Bukhari* mentions the narrator as ʿUrwah, a well-known Companion of the Prophet.

45 Hamilton, C., (trans.), *Al-Hedaya*, 1989, p.112.

46 Farooq, M. O., "Fundamental Human Dignity and the Mathematics of Slavery," (2006).

47 Hamilton, C., (trans.), *Al-Hedaya*, 1989, p.112.

48 Ibid., p.113.

49 Ibid., p.14.

50 Ibid., pp.111–112.

51 Hamilton, C., (trans.), *Al-Hedaya*, 1989, p.114.

52 Dayal, (trans.), *Durr-ul-Mukhtar*, 1982, p.50.

53 Ibid., p.50.

54 Ibid., p.50.

55 Ibid., p.52; in the footnote it is clarified: "According to Hanafis, a marriage between a Hanafi male and a Shafei female is valid, but according to the Shafei sect it is invalid – the *Raddul Muhtar*, vol. 2, p.351." *Radd al-Muhtar* is Ibn ʿAbidin's (d. 1836 CE) commentary on Haskafi's *Durr-ul-Mukhtar*, one of the most highly regarded Hanafi compendiums of *fiqh*.

56 Hamilton, C., (trans.), *Al-Hedaya*, 1989, p.110.

57 Dayal, (trans.), *Durr-ul-Mukhtar*, 1982, p.48.

58 Hasan, A., (trans.), *Sunan Abu Dawud*, 1990, vol. II, pp. 562–563, referring to *Awn al-Ma'bud*, II, 197.

59 Al-Ati, H. A. *The Family Structure in Islam* (Indianapolis, IN: American Trust Publications, 1977), pp.84–97.

60 In the Islamic literature in English, the expression "pre-Islamic" is commonly used to identify the period of *Jahiliyyah* or ignorance. The expression "pre-Islamic" appears in this essay only in quotations from others. When various authors use "pre-Islamic," they basi-

cally mean before the period when Muhammad became a Prophet. Thus, it could be described as pre-Muhammad. From the Islamic viewpoint, there is no "pre-Islamic" period in human history, as Islam began with Adam/Eve and continued through the prophets all the way to the last Prophet and Messenger, Muhammad.

"*The same religion* (*din*) has He established for you as that which He enjoined on Noah – the which We have sent by inspiration to thee – and that which We enjoined on Abraham, Moses, and Jesus: Namely, that you should remain steadfast in religion, and make no divisions therein: to those who worship other things than Allah, hard is the (way) to which you call them. Allah chooses to Himself those whom He pleases, and guides to Himself those who turn (to Him)" (*Surah al-Shura*, 42:13).

While non-Muslims, who do not believe that Islam began with the beginning of humanity, may use the expression "pre-Islamic," it is not appropriate for Muslims to use it, since it lends credence to the position of those who suggest or hold that Islam began with Prophet Muhammad and use Islam and Muhammadanism interchangeably.

61 Al-Ati, 1977, p.88.

62 Farooq, M. O., "Freedom and Choice: The First Order Condition of Islam," (2004).

63 Farooq, M. O., "Fundamental Human Dignity and the Mathematics of Slavery," (2006).

64 Khan, M. M., (trans.), *Sahih al-Bukhari*, vol. 7, hadith no. 286.

65 Ibid., vol. 2, Book 18, hadith no. 163.

66 Siddiqi, A. H., (trans.), *Sahih Muslim*, vol. iii, hadith no. 4074.

67 Ibid., hadith no. 4079.

68 Ibid., hadith no. 4089.

69 Ibid., hadith no. 4096.

70 Khan, M. M., (trans.), *Sahih al-Bukhari*, vol. 1, no. 29.

71 Ibid., vol. 1, no. 12.

72 Siddiqi, A. H., (trans.), *Sahih Muslim*, vol. iv, Kitab al-Fada'il al-Sahabah, no. 5958.

73 Khan, M. M., (trans.), *Sahih al-Bukhari*, vol. 3, hadith no. 430.

74 Ibn Hanbal, *Musnad Ahmad*, no. 18672.

75 Khadduri, M., (trans.), *Al-Shafi'i's Risala*, 1987, p.321.

76 Rahimuddin, M., (trans.), *Muwatta Imam Malik,* Kitab al-Ashribah, no. 1559.

77 Hamilton, C., (trans.), *Al-Hedaya*, 1989, p.88.

78 Ibid., p.212.

79 *Hedaya* has a separate chapter on Manumission (*'Itq*) of slaves. Interestingly, it begins with a Prophetic narration in this regard and points out that the emancipation of slaves was recommended. However, the very next paragraph begins as "Emancipation is approved." There is a difference between something being recommended and something being approved. Moreover, rulings about slavery are interspersed throughout the book. If readers did not read the chapter of Manumission separately, they would be unlikely to know that manumission was recommended.

80 Hamilton, C., (trans.), *Al-Hedaya*, 1989, p.88.

81 Ibn Hanbal, *Musnad Ahmad*, 1993, hadith no. 18672.

82 Al-Ati, 1977, p.56.

83 Ibid., p.59.

84 Ibid., p.62.
85 Ibid., pp.62–63.
86 Ibid., pp.64–65.
87 Ibid., p.67.
88 Ibid., pp.68–69.
89 Ibid., p.68.
90 Ibid., p.68.
91 Hamilton, C., (trans.), *Al-Hedaya*, 1989, p.150.
92 Ibid., p.150.
93 Ibid., p.151.
94 Ibid., p.92.
95 Al-Ati, 1977, pp.68–69.
96 Ibid., p.70.
97 Hamilton, C., (trans.), *Al-Hedaya*, 1989i, pp.401–402.
98 Dayal, (trans.), *Durr-ul-Mukhtar*, 1982, p.322.
99 Hamilton, C., (trans.), *Al-Hedaya*, 1989, p.402.
100 Ibid., p.392.
101 Dayal, (trans.), *Durr-ul-Mukhtar*, 1982, p.316.
102 Hamilton, C., (trans.), *Al-Hedaya*, 1989, p.396.
103 Al-Ati, 1977, p.181.
104 Ibid., p.152.
105 Ibid., p.152.
106 Moghul, 1999, pp.15–16.
107 Al-Ati, 1977, pp.153–154.
108 Ibid., pp.154–155.
109 Hamilton, C., (trans.), *Al-Hedaya*, 1989, p.392.
110 Cowan, J. (ed.), *Arabic-English Dictionary: Hans-Wehr Dictionary of Modern Written Arabic* (Ithaca, New York: Spoken Language Services, Inc., 1976), p.153.
111 Dayal, (trans.), *Durr-ul-Mukhtar*, 1982, p.316.
112 AbuSulayman, 1987, p.68.
113 AbuSulayman, 1993, p.50.
114 Ibid., p.51.
115 Also see, Dr. Taha J. Alalwani, *Nahwa Mawqif Qur'ani min al-Naskh* [Towards a Qur'anic Position on Abrogation] (Egypt: Maktabah al-Shuruq al-Dawliyyah, 2007), in which he rejects the concept of abrogation.
116 AbuSulayman, 1987, p.68, quoting al-Shafi^{c}i, *Al-Umm*, vol. IV, pp.90–91; and Ibn Rushd, *Bidayat al-Mujtahid*, vol. 1, pp.313–314.
117 Ibid., p.68.
118 Ibid., p.17.
119 Ibid., p.68.
120 Ibid., p.84.
121 Farooq, M. O., "Riba, Interest and Six Hadiths: Do we have a Definition or a Conundrum?" (2009)
122 Kamali, 2003, p.301.

CHAPTER 6

1 Literally, the term means "trodden path." In Islam the Sunnah of the Prophet means "the way of the Prophet."
2 Unlimited, unrestricted, and exclusive power for men to unilaterally divorce was prevalent in the pre-Muhammad Arabian society, where men used to own or possess women. The Qur'an changed all that and provided clear and specific procedure for divorce, when marriage cannot be saved.
3 Zaman, R. and H. Movassaghi, "Interest-Free Islamic Banking: Ideals and Reality," *The International Journal of Finance* 14(4) (2002), pp.2428–2443, 2002.
4 El Fadl, 2002, p.10.
5 El-Gamal, 2006, p.17.
6 Ramadan, 2004, pp.127–128.
7 Emon, A., "Islamic Law and the Canadian Mosaic: Politics, Jurisprudence, and Multicultural

Accommodation," *Canadian Bar Review*, vol. 87, no. 2, February 2009, p.402.

8 Muslehuddin, 1986, p.135.

9 The authors use the title Mst. assuming that the readers are familiar with it. It is not clear, but most likely it stands for *musammat*, a title for married Muslim woman, commonly used particularly in South Asia.

10 Jahangir and Jilani, 1990, p.90.

11 Baldauf, S., "Pakistani religious law challenged," *Christian Science Monitor* (March 2, 2005).

12 There are many contemporary scholars, including Syed Sulaiman Nadvi (d. 1953 CE), who disagree with this position. "Nadvi opposes the view of many traditionalist scholars who claim that ʿUmar's decision was unanimously agreed upon by all the *sahabah*, or companions, of the Prophet present." Sikand, Y., "Triple *talaq*: counter–perspective," 2004, http://www.sabrang.com/cc/archive/2004/july04/cover10.html. [Accessed June 21, 2007].

13 View the chapter on divorce in any major legal compendium, including al-Marghinani's, *Al-Hedaya*, which is a Hanafi compendium. Hamilton, C., (trans.), *Al-Hedaya*, 1989.

14 For an illuminating work of great historical interest concerning this subject, see Masud, M. K., "Apostasy and Judicial Separation in British India," in *Islamic Legal Interpretation: Muftis and Their Fatwas* (Cambridge, Massachusetts: Harvard University Press, 1996), pp.193–203. For a more detailed exposition of *talfiq*, see Krawietz, B., "Cut and Paste in Legal Rules: Designing Islamic Norms with Talfiq," *Die Welt des Islams* 42(1) (April 2002), pp.3–40.

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16 Ahmad, Farzand, "No, triple talaq can't be abolished," *India Today*, Interview with All India Muslim Personal Law Board, January 31, 2010, http://indiatoday.intoday.in/site/Story/81719/Web%20Exclusive/No,+triple+talaq+can't+be+abolished.html. [Accessed, February 13, 2011]; Also Frank Vogel observes: "On the basis chiefly of … the hadith of Tawus from Ibn Abbas, the four Sunni schools settled on a view that a triple talaq issued on a single occasion has the same consequences as three talaqs issued separately. In the Hanbali school, the work which establishes, more than any other, the views of the school is *al-Mughni* by Muwaffaq al-Din Ibn Qudama (d. 620/1223). This book is notable for mentioning the views of all four Sunni schools as well as of many earlier scholars," Vogel, Frank E., *Islamic Law and Legal System: Studies of Saudi Arabia* (Leiden, Netherlands: Brill, 2000), p.11.

17 Moors, A. and C. Tripp, *Women, Property and Islam: Palestinian Experiences, 1920–1990* (Cambridge, Massachusetts: Cambridge University Press, 1996).

18 Sadeghi-Hassanabadi, A., H. Keshavarz, E. Setoudeh-Maram and Z. Sarraf, "Prevalence of reproductive morbidity among women of the Qashqa'i tribe, Islamic Republic of Iran," *Eastern Mediterranean Health Journal* 4(2) (1998), pp.312–318.

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20 Ramadan, H., *Understanding Islamic Law: From Classicial to Contemporary* (MD, USA: Rowman Altamira, 2006), p.112.

21 Omran, Abdel, *Family Planning in the Legacy of Islam* (London, UK: Routledge, 1992), p.18.

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23 AbuSulayman, 1993, pp.38, 42–43. Both the Hanafi and Maliki schools recognize the validity of *istihsan*. However, they differ in terms of the scope and nature of the concept. For the Maliki view, see Abu Zahrah, undated.

24 Krawietz, 2002.

25 AbuSulayman, 1993, pp.98–99.

26 AbuSulayman, 1983, p.60.

27 Al-Qaradawi, Y., 2006, p.265.

28 Siddiqi, A. H., (trans.), *Sahih Muslim*, vol. iii, pp.832, hadith no. 2021.

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30 Mawdudi, S. A. A., *Sood o Adhunik Banking* (Interest and Modern Banking) (Dhaka, Bangladesh: Adhunik Prokashoni, 1987), pp.134–135.

31 Useem, J., "Banking On Allah: Devout Muslims don't pay or receive interest. So how can their financial system work?" *Fortune* (June 10, 2002); Farooq, M., "Self-Interest, Homo Islamicus and Some Behavioral Assumptions in Islamic Economics and Finance," *International Journal of Excellence in Islamic Banking and Finance*, vol. 1, No. 1, pp.52–79, January 2011. http://ssrn.com/abstract=1740729. [Accessed on February 11, 2011].

32 Farooq, M. O., "Partnership, Equity-Financing and Islamic Finance: Whither Profit-Loss Sharing?" *Review of Islamic Economics* (11) (2007d), pp.67–88.

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34 Usmani, M. T., *An Introduction to Islamic Finance*, p.xvi.

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36 El Gamal, 2000b, p.12, fn no. 3.

37 Usmani, 2002, p.113.

38 Ibid., p.xiv.

39 Ibid., p.xiv.

40 Ibid., p.xv.

41 Ibid., p.xv.

42 Ibid., p.113.

43 Kamali, 2003, p.104.

44 Usmani, 2002, p.xvi.

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48 Iqbal, 2000, p.129.

49 AbuSulayman, 1987, pp.76–78.

50 AbuSulayman, 1987, p.81.

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ces.htm. [Accessed July 16, 2007].

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CHAPTER 7

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3 Asia Sentinel, "Once a Muslim, Always a Muslim in Malaysia," May 30, 2007, http://www.asiasentinel.com/index.php?option=com_content&task=view&id=515&Itemid=34 (accessed October 21, 2007).

4 Khan, M. M., (trans.), *Sahih al-Bukhari*, vol. 1, hadith no. 828.

5 Notably, Sayyid Abul Ala Mawdudi, Shaikh Yusuf Al-Qaradawi, and so on.

6 Farooq, M. O., "O Allah! You are My Servant and I am Your Lord: The Language of Love," (2003).

7 El Gamal, 2006, p.2.

8 In the aftermath of 9/11, al-Qaradawi denounced the attack "killing hundreds of helpless civilians who have nothing to do with the decision-making process and are striving hard to earn their daily bread, such as the victims of the latest explosions in America, is a heinous crime in Islam. ... I categorically go against a committed Muslim's embarking on such attacks. Islam never allows a Muslim to kill the innocent and the helpless." However, when he made

some exceptions to the Palestinian resistance, "I have been asked several questions on TV programs and on public lectures about the martyr operations outside the Palestinian territories, and I always answer that I do agree with those who do not allow such martyr operations to be carried out outside the Palestinian territories." Retrieved February 11, 2007 from Islam Online Website: http://www.islamonline.net/English/News/2001–09/13/article25. shtml.
Al-Qaradawi considers any attack against women even in war as unacceptable. "Even in times of war, Muslims are not allowed to kill anybody save the one who is indulged in face-to-face confrontation with them. They are not allowed to kill women, old persons, children, or even a monk in his religious seclusion." [Ibid.]. However, he makes an exception to Israeli women. "Defending suicide bombings that target Israeli civilians Shaykh Al-Qaradawi told the BBC programme Newsnight that 'an Israeli woman is not like women in our societies, because she is a soldier.'" Magdi Abdelhadi, "Controversial preacher with 'star status,'" BBC News, July 7, 2004, http://news.bbc.co.uk/2/hi/uk_news/3874893.stm. [Accessed February 12, 2007]. Although this author personally holds Shaykh Yusuf al-Qaradawi in high esteem to the extent that he is regarded as one of the voices of Islamic conscience and enlightenment of our time, nevertheless it is important to be unequivocally critical of his views of apostasy as well as his selective approval of targeting innocent civilians.

9 Masud, M. K., "Teaching of Islamic Law & Shari'ah: A Critical Evaluation of the Present & Prospects for the Future," *Islamic Studies* 44(2) (Summer 2005b), p.176, quoting al-Ulayni, *Ahammiyyat al-Jihad fi Nashr al-Daʿwah al-Islamiyyah wa al-Raddʿala al-Tawa'if al-Dallah fih* (Riyadh: Dar Tayyibah li al-Nashr wa al-Tawziʿ, 1985), pp.116–117.

10 Masud, ibid., 2005, p.178.

11 See Chapter 5, note no. 116.

12 Laliwala, 1983, p.29.

13 "You have indeed in the Messenger of Allah a beautiful pattern (of conduct) for any one whose hope is in Allah and the Final Day, and who engages much in the Praise of Allah." (*Surah al-Ahzab*, 33:21).

14 Laliwala, 1983, p.25.

15 "My mercy extends to all things." (*Surah al-Aʿraf*, 7:156).
"… He has inscribed for Himself (the rule of) Mercy …" (*Surah al-Anʿam*, 6:12).
"When Allah decreed the Creation He pledged Himself by writing in His book which is laid down with Him: My mercy prevails over my wrath." Imam al-Nawawi's Forty Hadith Qudsi, no. 1, http://www.usc.edu/schools/college/crcc/engagement/resources/texts/muslim/hadith/hadithqudsi.html. [Accessed on October 15, 2008].

16 *Surah al-Nisa'*, 4:79; *Surah al-Anbiya'*, 21:107.

17 *Surah Hud*, 11:88.

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TESTIMONIALS

THE AUTHOR, IN HIS ATTEMPT to trace the development of Islamic laws, has raised pertinent questions about the fundamental assumptions of Fiqh, especially the place of Hadith and Muslim legists' use of Ijmaᶜ and *Qiyas*. He has challenged the validity of the classifications of Hadith and Hadith collection methods as well. Dr. Farooq,s studies are very valuable for contemporary Islamic scholars as well as the inquisitive reader. He has brilliantly portrayed the ongoing tension between the forces of rigid conservatism and of modernity and reform. Many conscientious Muslims admit that the corpus of Islamic laws has become asynchronous with the spirit of Islam and often clash with the contemporary challenges and realities. The so-called Islamic countries that have only partially instituted the traditional Islamic social and commercial laws have found the rigid or literal interpretations out of sync, embarrassing, or outright impractical. Very well written, rationally argued, thorough and logical. Highly recommended.

DR. OMAR AFZAL
Islamic scholar and former librarian, Cornell University, Ithaca, New York

DR. FAROOQ'S BOOK IS AN alert and knowledgeable exposition of some core issues in Islam. At a time when there is so much misunderstanding and confusion about Islam, this book is all the more welcome for its clarity and organization. Ideas are expressed clearly, examples are given liberally, and conclusions are drawn logically. This book can, and should be, read both by Muslims to cut through the obfuscating and tendentious narratives presented by so many current writers, and by non-Muslims to understand the modernity, the relevance, and the moral dimension of Islam. The author is non-defensive and non-dogmatic, and readily acknowledges the pathologies and perversions demonstrated in many Muslim-majority countries. It is this reasonableness that makes the book attractive, while the comparative approach, the historical context, and the legal framework within which the discussion is framed, makes the analysis credible and keen.

DR. AHRAR AHMAD
Professor of Political Science, Black Hills State University, South Dakota, USA

DR. FAROOQ'S CRITIQUES ARE exceedingly substantive and provocative. As I read his analysis, I felt like reading my own critiques of Islamic jurisprudence as it is theorized and practiced in the world today. At times, I also felt that I didn't see many of the issues until I read this work. I trust any rational person will have similar feelings when they engage seriously reading this book. The author is rightly redirecting our attention to

the critical issues that affect Muslim lives and societies but have eluded sufficient critical analysis and reflection of the major Islamic scholars. This is a monumental and much needed contribution to Islamic scholarship today.

DR. MOHAMMAD A. AUWAL
Associate Professor of Communications, California State University, Los Angeles

SERIOUS STUDENTS of Islam, Muslim as well as non-Muslim, find themselves constantly faced with the necessity of learning about the basic elements of the faith, namely, the Divine law (Shari^{c}ah), the sayings and practices of the Prophet as well as of the early believers (Sunnah), the way consensus (Ijma^{c}) among jurists works and the limitations upon it, and the use of analogical reasoning (*Qiyas*) to clarify beliefs and actions. To understand these elements better and discern how they are to be used in daily life, it is necessary to return to the key sources and investigate the way they have been interpreted through the ages. The task is daunting but necessary, especially now that such attention is focused on the faith and its adherents and questions are raised about whether there is an irreducible core faith and unchangeable core conduct or both are subject to new conditions not foreseen in the beginning.

These questions, present since the earliest days of Islam, have more recently prompted inquiry about the intentions or purposes of the divine law (*Maqasid al-Shari^{c}ah*). Mohammad Omar Farooq's *Toward our Reformation* provides important insights into these and other equally salient contemporary questions. With clear prose and thoughtful arguments, he leads readers through the many controversies surrounding the faith and its core elements today, then offers persuasive resolutions to them. Farooq makes excellent use of earlier as well as contemporary Muslim scholars who have written on these very issues, even as he pushes them to positions more directly focused on issues of our time. Moreover, he carefully indicates how older authorities might be read with an eye to the issues of the day. Indeed, his main concern here is to show clearly how Islam can respond positively to the many innovations of this age without losing any of its core appeal. The reformation he urges is one meant to enhance and strengthen Islam, nothing else.

PROFESSOR CHARLES E. BUTTERWORTH
Emeritus Professor of Government and Politics, specializing in medieval Arabic and Islamic political philosophy, University of Maryland, USA

ONCE IN A GOOD LONG WHILE a cogent piece of writing – completely different from all others in the discipline – appears and for this reason the content constitutes a very special book indeed. Neither a work of jurisprudence nor an account of Islamic philosophy or theology the author has, instead, chosen to tackle the momentous task of analyzing the predominant intellectual causes behind the myriad formidable problems afflicting the Muslim Ummah (community) of the present era. That a clear diagnosis exists, is shocking, highly credible and persuasive represents only part of this

works' importance, as compelling and imperative are the suggested remedies. All those who care about reforming the present decadent understanding and practice of Islam with a view to returning it back to some semblance of its pristine original ethos must read this book.

DR. STEVE (SOLEIMAN) CONNOLLY
Senior Lecturer in Organic Chemistry, School of Science & Technology, University of Teesside, UK

THIS BOOK, is an excellent work on the main sources of Islamic Law, the Qur'an, Sunnah, Ijma[c] and *Qiyas*. He has discussed many vexing questions pertaining to these sources, their definitions, use and interpretations. Dr. Farooq has highlighted the stagnation and literalism in law in the past and the need for value orientation in the future development of Islamic Law. On many issues he has differed from early jurists but in each case he has extensively referred to reputable scholars of the past and present in his support and given his reasons. This book is a valuable addition to the literature on Jurisprudence of Islamic law and everybody will benefit from reading this book even if one does not agree with some of his views.

SHAH ABDUL HANNAN
Former Chairman, Islami Bank Bangladesh; Former Deputy Governor, Bangladesh Bank

THOSE WHO SEEK A DEEPER understanding of Islam than that provided by the prevalent orthodoxy can pursue one of two paths; either seek to clarify Islamic historical source material and thereby affect the Muslim world-view, or provide a rearranged priority to Islamic values which will then affect everyday Muslim life. Omar Farooq has provided much exemplary discussion based on the latter theme. While there is frequent reference to historical material, especially when he deals with subjects like *riba* (interest), his overarching theme consists of claims about the primary Islamic values and how the inspiration for these has been dulled by the legalism of the last five hundred years. He has undertaken a much-needed task with dedication, devotion and scholarship. All those interested in the future of Islam will benefit from a close study of Farooq's pioneering writings.

DR. SALIM RASHID
Professor of Economics, University of Illinois, Urbana Champaign

THIS IS AN EXTREMELY INTERESTING book in an ever-growing scholarly field of Islamic Law where significant academic investigations and scholarly researches are going on these days. In this vast body of literature, the book deserves special merit as it addresses a number of important legal issues that are affecting seriously day to day lives of the Muslims such as *hudud*, *riba*, women's right etc. Dr. Farooq has worked painstakingly to bring out certain living legal issues of contemporary Muslim societies

which have not been addressed so genuinely and lively ever before, for which he deserves profound appreciation and genuine recognition. The book is indeed a refined and sophisticated analytical research work leading finally towards some conclusive remarks about the legal dilemma of the contemporary Muslim world. Dr. Farooq is to be commended for presenting this wonderful book on Islamic fiqh to the specialist as well as to common readers.

DR. MOHAMMAD YUSUF SIDDIQ
Department of History & Islamic Civilization, University of Sharjah, United Arab Emirates

It is the author's contention that at the heart of the Muslim predicament lies ignorance and/or lack of commitment to core Islamic values, thus what is advocated throughout this work is a return to what is termed a "value-oriented" approach. We further learn that with the passage of time what we today consider to be the Shariah is in effect an original hub enveloped in a labyrinthine shroud of scholastic views and deductions hindering Muslim development, and to rely on fraudulent hadith and fallacious implementation of *hudud* law is not only to betray the spirit of the Qur'an and the Prophet's message, but a disastrous exercise. Consequences being blatant abuse of the Muslim populace under cover of implementing a bogus Shariah. This abuse and misapplication is explored throughout the work.

The book consists of five core chapters. After the introductory first chapter, chapter two focuses on the Shariah and explores issues concerning misconceptions about the term as well as the propensity towards legalism. Chapter three focuses on Hadith, examining certain vital issues pertaining to the subject, concluding with the documentation of the problems concerning the misuse of Hadith in deriving or formulating laws. Chapter four deals with the subject of ijma, where most of the claims concerning it are demonstrated to be unfounded and untenable based on a consistent lack of consensus regarding almost all aspects of ijma as a source of Islamic jurisprudence. Chapter five, on *qiyas*, deals with the many conceptual problems of the misapplication of this tool in Islamic legal promulgation. Thereafter, chapter six emphasizes that an empirical foundation is critically needed to render balance to Islamic law once again, by balance meaning that text-orientation be duly matched by life-orientation, in today's sense. Clearly the author contends that the prevailing conditions of the Muslim world are not expected to change unless Muslim thought and understanding of the foundational sources of Islam also changes in the first instance.

An excellent work on the main sources of Islamic Law, the Qur'an, Sunnah, Ijma and *Qiyas*. The author has discussed many vexing questions pertaining to these sources, their definitions, use and interpretations. He has highlighted the stagnation and literalism in law in the past and the need for value orientation in the future development of Islamic Law. **Shah Abdul Hannan, Former Chairman, Islami Bank Bangladesh; Former Deputy Governor, Bangladesh Bank.**

A refined and sophisticated analytical research work leading finally towards some conclusive remarks about the legal dilemma of the contemporary Muslim world. **Dr. Mohammad Yusuf Siddiq, Department of History & Islamic Civilization, University of Sharjah, United Arab Emirates.**

Neither a work of jurisprudence nor an account of Islamic philosophy or theology the author has, instead, chosen to tackle the momentous task of analyzing the predominant intellectual causes behind the myriad formidable problems afflicting the Muslim community of the present era. **Dr. Steve (Soleiman) Connolly, Senior Lecturer in Organic Chemistry, School of Science & Technology, University of Teesside, UK.**

With clear prose and thoughtful arguments, [the author] leads readers through the [issues] surrounding the faith and its core elements today, then offers persuasive resolutions to them. Moreover, he carefully indicates how older authorities might be read with an eye to the issues of the day. Indeed, his main concern here is to show clearly how Islam can respond positively to the many innovations of this age without losing any of its core appeal. **Professor Charles E. Butterworth, Emeritus Professor of Government and Politics, University of Maryland, USA.**

Some of the chapters make very painful reading indeed. But that is what is out there in reality. The author is only holding a mirror to our face. [The crisis we are facing today] is what comes out of a methodology that neglects the *Maqasid al-Shariah*, relying exclusively on fiqh rulings given hundreds of years ago in a different social milieu. Some stocktaking is seriously overdue. **Dr. M.N. Siddiqi, Professor Emeritus, Department of Business Administration, Aligarh Muslim University, India.**

Dr. Mohammad Omar Farooq is Head of the Centre for Islamic Finance, Bahrain Institute of Banking Finance. His interests include Islamic economics/banking/finance, Islamic law and jurisprudence, and Islamic political economy.

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Abou Zayd preaching in the Mosque, from 'Al Maqamat' (The Meetings) by Al-Hariri (vellum)